TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible].

No. 23,337

LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLANT,

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

FILED SEPTEMBER 8, 1902.

(23,344)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

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vs.

THE WESTERN UNION TELEGRAPH COMPANY.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 8, 1912.

1 United States District Court for the Southern Division of the Southern District of Mississippi.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
v.
WESTERN UNION TELEGRAPH COMPANY.

To the Honorable H. C. Niles, Judge of the District Court of the United States for the Southern Division of the Southern District of Mississippi:

The Louisville & Nashville Railroad Company, a corporation created by, and organized under, the laws of the State of Kentucky, having its principal place of business in the City of Louisville, in the State of Kentucky, and a citizen of the State of Kentucky, brings this, its bill of complaint,

Against

The Western Union Telegraph Company, a corporation created by, and organized under, the laws of the State of New York, and having its principal place of business in the City of New York, and a citizen of said State, and shows unto Your Honor:

I.

That this is a suit between citizens of different states of the United States; viz., between the Louisville & Nashville Railroad Company, a citizen of the State of Kentucky, and the Western Union Telegraph Company, a citizen of the State of New York, and the amount in dispute, between the complainant and defendant, exclusive of interest and costs, exceeds the sum of Three Thousand Dol-
2 lars, ($3,000.00); it is brought to enforce a claim to, and to remove a cloud from, the title to real property, situate in the State of Mississippi, within the Southern Division of the United States Southern Judicial District of said State. The real estate, upon which the complainant seeks to enforce a claim, and from the title to which it seeks to remove a cloud, consists of a strip of land, constituting complainant's right of way, lying on each side of its main railroad track, and extending from the dividing line between the County of Jackson, in the State of Mississippi, and the County of Mobile, in the State of Alabama, to the dividing line between the County of Hancock, in the State of Mississippi, and the State of Louisiana, including its bridges in the Counties of Harrison and Hancock, in the State of Mississippi. The property so taken is more particularly described in the several judgment entries hereinafter set out, purporting to be judgment entries of Courts of Eminent Domain.

II.

If complainant does not enforce its said claim, and remove said cloud from its title to said real estate, it will be deprived of its prop-

erty without due process of law, and will also be denied the equal protection of the laws, under color of right arising out of the provision of a legislative enactment of the State of Mississippi. For protection against the taking of its said property, and against such denial to it of the equal protection of the law, Complainant relies upon, and invokes the aid and protection of, so much of the Fourteenth Amendment to the Constitution of the United States, as is in these words:

"No state shall make or enforce any law which shall abridge the privilege and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3 Complainant avers, however, that the alleged condemnation proceedings are void for other reasons shown by the allegations of this bill of complaint, and that it would, therefore, be entitled to the relief prayed for, even had its property not been taken without due process of law, or it denied the equal protection of the law.

III.

The property sought to be condemned formerly belonged to the New Orleans, Mobile & Texas Railroad Company, as Re-organized, but in 1881, Complainant purchased from said Company all of the railroad property then belonging to it, and received a duly executed conveyance thereof, and has, for more than twenty years, owned a fee simple title to, and has, under a claim of ownership, used, occupied, and been in the continuous and exclusive possession of, the right of way and bridges sought to be subjected to the uses of the defendant, the Western Union Telegraph Company, by the condemnation proceedings hereinafter mentioned.

IV.

The Defendant, the Western Union Telegraph Company, owns, maintains, and operates, and for many years has owned, maintained, and operated, a line of telegraph poles and wires upon and along the said right of way, from the dividing line between the State of Alabama and the State of Mississippi, to the dividing line between the State of Mississippi and the State of Louisiana. Said telegraph line is, and has for many years been, located, maintained, and operated upon Complainant's said right of way, and upon or attached to its said bridges, under a contract between the Complainant and the Defendant, the Western Union Telegraph Company, and not otherwise, and by one of its provisions, said contract may be terminated by either of the parties thereto at the expiration of one year, after written notice shall have been given by one of the parties thereto, to the other of said parties, of a desire or intention to terminate the same. Said contract will terminate on

4 August 17, 1912, pursuant to a notice that has been given thereof by the defendant, as provided by the terms of said contract.

V.

Under an alleged power of eminent domain, which it claims is vested in it by the laws of the State of Mississippi, the Defendant, the Western Union Telegraph Company, attempted to obtain, by the proceedings herein alleged and complained of, the right to continue the use of Complainant's said right of way for the maintenance and operation of said Western Union Telegraph Company's said existing line of poles and wires thereon, without any intention to construct any new telegraph line, and to this end, the said Defendant, the Western Union Telegraph Company, presented three separate applications for the condemnation and use of the Defendant, the Western Union Telegraph Company, of parts of Complainant's said right of way and bridges lying in said respective counties, as hereinafter alleged.

VI.

A copy of each of said applications are hereto attached, and made parts hereof, and are marked Exhibits "A", "B", and "C", respectively.

VII.

Section 1854, Chapter 43, of the Code of Mississippi of 1906, provides as follows:

"Any person or corporation having the right to condemn private property for public use shall exercise that right as provided in this chapter, and not otherwise, except as specified in the Chapter on landings, mill, and mill dams and roads, ferries and bridges."

Section 1856, which is likewise part of Chapter 43 of the Code of Mississippi of 1906, provides as follows:

"When any person or corporation having the right to do so shall desire to exercise the right of eminent domain, he or it shall make application therefor, in writing, and the owners of the property sought to be condemned, and the mortgagees, trustees, or other persons having an interest therein, or a lien thereon, shall be made defendants thereto, which shall state, with certainty, the right, and describe the property sought to be condemned, showing that of each defendant separa. y. Applications shall be presented to the Clerk of the Circuit Court of the County who shall endorse thereon his appointment of a competent Justice of the Peace of the county in which the property, or some part of it, is situated, to constitute, with a jury, a special court of eminent domain; and he shall fix the time and place in the county for the organization thereof."

The application of which Exhibit "A" is a copy, was presented to A. J. Ramsey, Jr., the Deputy Clerk of the Circuit Court of Harrison County, Mississippi, and thereupon, said Deputy Clerk made a separate order, in writing, appointing one H. D. Moore, a Justice of the Peace of Harrison County, Miss., to try, with a jury to be drawn, the issue between the Complainant and the Defendant, and fixed the 27th day of December, 1911, at 10 o'clock A. M., in the Court House of Harrison County, Miss., for the organization of a court of eminent domain, but made no endorsement of such appointment upon the application presented to him by the Complainant.

The application, of which Exhibit "B" is a copy, was presented by Complainant to one W. C. Havens, the Deputy Clerk of the Circuit Court of Jackson County, Miss., and upon the presentation of such application to the said Havens, he, the said Havens, made an order, in writing, appointing one Chas. E. Chidsey, a Justice of the Peace of Jackson County, Miss., to try, with a jury which was summoned, the issue between the Complainant and the Defendant, and fixed the 10th day of January, 1912, in the Court House of Jackson County, Mississippi, for the organization of a special court of eminent domain, but said appointment was not endorsed upon the application.

6 Thereafter, on the 29th day of December, 1911, Fred Taylor, who was the Clerk of the Circuit Court of Jackson County, made an endorsement upon said application, and re-issued and caused a new summons to be served upon the Complainant, the said endorsement reading as follows:

"WESTERN UNION TELEGRAPH COMPANY
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY et als.

I, Fred Taylor, Clerk of the Circuit Court of Jackson County, do hereby certify that the petition, upon which this endorsement is made, was filed in my office on the 25th day of November, A. D., 1911, and immediately upon the filing of said petition, I appointed and constituted Charles E. Chidsey, a duly qualified Justice of the Peace of said County, to try, with a Jury drawn according to law, the issue between the Western Union Tel. Co. and the defendant, the Louisville & Nashville R. R. Co., et als., which appointment was made in writing and duly filed with the papers in the cause, and I fixed 10 o'clock A. M., of the 10th day of January, A. D. 1912, at the Court House of said County at Pascagoula, Miss., as the time and place for the hearing of said cause, all of which was done in writing and duly filed in the records of this case.

Now, therefore, in pursuance of said acts, and in order to further evidence the same, I now on this the 29th day of Dec., make this endorsement upon said petition, and also attach and affix to said petition the required appointment and designation made by me at the time said petition was filed.

Given under my hand, this the 29th day of Dec., A. D. 1911.

FRED TAYLOR,
Clerk Circuit Court, Jackson C-ty."

Upon the hearing of the application by the alleged court of eminent domain, on the 10th day of January, 1912, the Defendant, the Western Union Telegraph Company, amended its said application, and a copy of said amendment is hereto attached, marked Exhibit "D", and made a part hereof.

7 The application, of which Exhibit "C" is a copy, was presented by the Complainant to W. W. Stockstill, the Clerk of the Circuit Court of Hancock County, Mississippi, and he, the said

W. W. Stockstill, made an order, in writing, appointing John A. Breath, a Justice of the Peace of said County, to try, with a jury to be drawn, the issue between the Complainant and the Defendant, and fixed the 8th day of January, 1912, in the Court House of Hancock County, Mississippi, for the organization of a special court of eminent domain, but said appointment was not endorsed upon the application.

Thereafter, on the 30th day of December, 1911, the said W. W. Stockstill, Clerk of the Circuit Court of Hancock County, made an endorsement upon the application, and re-issued and caused a new summons to be served upon the Complainant, the said endorsement reading as follows:

"WESTERN UNION TEL. CO.
vs.
LOUISVILLE & NASHVILLE R. R. Co. et als.

I, W. W. Stockstill, Clerk of the Circuit Court of Hancock County, do hereby certify that the petition, upon which this endorsement is made, was filed in my office on the 28th day of Nov., A. D. 1911, and immediately upon the filing of said petition, I appointed and constituted Mr. J. N. O. Breath, a duly qualified Justice of the Peace of said County, to try, with a jury drawn according to law, the issue between the Western Union Tel. Co. and the defendants, the Louisville & Nashville R. R. Co., et als., which appointment was made in writing and duly filed with the papers in this case, and I fixed 10 o'clock A. M., of the 8th day of January, A. D. 1911, at the Court House of said County in Bay St. Louis, as the day and place for the hearing of said cause, all of which was done in writing and duly filed in the records of the case.

Now, therefore, in and by reason of said action, and in order to further evidence same, I now, on the 30th day of December, make this endorsement upon said petition, and also attach to said petition the original appointment and designation made by me at the time said petition was filed.

Given under my hand this the 30th day of December, A. D. 1911.

[SEAL.] (Signed) W. W. STOCKSTILL,
Clerk Circuit Court, Hancock County."

VIII.

On the 27th day of December, 1911, the said H. D. Moore, and the jury drawn for that purpose, organized what purported to be a court of eminent domain.

Before the said Justice of the Peace, and jury, purporting to act as a court of eminent domain, entered upon the hearing of the testimony, the Defendant in said proceeding, the Louisville & Nashville Railroad Company, protested against proceeding with the hearing of the application of the Western Union Telegraph Company, to condemn any portion of the right of way and bridges of the Complainant, on the ground that no competent Justice of the Peace had been appointed by endorsing such appointment on the application for condemnation, as required by law, and the said H. D. Moore was

without authority to proceed with said condemnation proceeding. Disregarding said protest, the said alleged court of eminent domain proceeded to hear evidence as to the value of the property to be taken, and after said evidence had been heard, the said jury returned a verdict in the following language:

"We, the jury, find that the Defendants, the New Orleans, Mobile & Texas Railroad Company, as Re-organized, the Louisville & Nashville Railroad Company, and the Farmers Loan & Trust Company, will be damaged, by the taking of their property for public use, in the sum of $150.00."

Said verdict was signed by all the jurors.

Upon the return of said verdict, the said alleged court of eminent domain, entered the following judgment:

9 "In this case the claim of the Western Union Telegraph Co. to have condemned certain lands and property named in the application, to-wit:—So much of the right of way of the main line of the Louisville & Nashville R. R. Co., as lies in Harrison County, Miss., running from a point on the said right of way on the line dividing the Counties of Harrison and Jackson, which said point is located in the middle of the Bay of Biloxi, and on the bridge of the defendant Railroad Company spanning the said Bay of Biloxi: on the east, and thence extending westwardly through the County of Harrison to the dividing line between said County and Hancock County, on the west which is a point in the middle of the Bay of St. Louis, and on the bridge of the defendant Railroad Company, spanning said Bay of St. Louis, being a distance of thirty miles more or less, and which route is shown and delineated on a map of blue print annexed to applicant's Petition as Exhibit "A". Said right of way being 100 feet wide and constituting with those portions of the bridges lying in Harrison County a continuous strip of land extending from Jackson County line on the east to the Hancock County line on the west, and being right of way over which the main line of the defendant between New Orleans and Mobile is now constructed and being operated. Together with the right to attach poles, cross arms and wires to such portions of said bridges above mentioned as lie within said Harrison County in such convenient and proper way, and by such proper and prudent means as will in no wise endanger or impair said bridges, and will in no wise hamper, impede, obstruct, or interfere with the use thereof by said defendants and other authorized to use same.

This condemnation for the purpose of permitting said Western Union Tel. Co. to erect one line of poles with cross arms and wires upon and along said right of way and bridges of said defendants, all in the manner and with all the safeguards set forth in petitioner's petition, that is to say, in such manner and at such distance from defendants' track as in no way to interfere with the operation of
10 trains of said defendants or with any proper or legitimate use thereof by defendants, or the use by any telegraph or telephone company now existing thereon, and so as not to be dangerous to persons or property, and subject to all the stipulations and agreements in said petition contained, being the property of the L. & N.

R. R. Co. and the New Orleans, M. & T. R. R. Co., as Re-organized, and in which the Farmers' Loan & Trust Co. is interested as the Trustee in certain mortgages was submitted to a jury composed of: A. V. Marshall, H. J. Gillen, John Wein, Armond Sellier, J. B. Ladnier, Tom Cousins, J. J. Bond, W. W. Harrison, Joseph Saucier, L. A. Witter, F. S. Bond, and A. F. Breland, on the 28th day of Dec., A. D. 1911, and the jury returned a verdict fixing the defendants' due compensation and damages at $150.00, and the verdict was received and entered. Now, upon payment of said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application.

Let the applicant pay the costs, for which let execution issue Dec. 28, 1911.

H. D. MOORE,
Justice of the Peace."

The Western Union Telegraph Company tendered to the Complainant the amount of damages so adjudged, with interest, but the same was not accepted by Complainant.

On the 8th day of January, 1912, the said John A. Breath, Justice of the Peace as aforesaid, together with the jury drawn, met at the Court House of Hancock County, and organized what purported to be a Special Court of eminent domain.

Before said alleged Court of eminent domain proceeded to take testimony, the Defendant protested against proceeding with the hearing of the application of the Defendant to condemn any portion of the right of way and bridges of the Complainant, upon the ground that no competent Justice of the Peace had been appointed by an endorsement upon Complainant's application for condemnation, and that the said John A. Breath was therefore without jurisdiction or authority to proceed in said matter. The said alleged court of
11 eminent domain disregarded said protest, and proceeded to hear the evidence as to the value of the property to be taken, and after said evidence had been heard, the jury rendered a verdict in the following language:

"We the jury find that the Defendants, the New Orleans, Mobile & Texas Railroad Company, as Re-organized, the Louisville & Nashville Railroad Company, and the Farmers Loan & Trust Company, will be damaged by the taking of their property for public use, in the sum of $650.00."

Said verdict was signed by all the jurors.

Upon the return of said verdict, the said court of eminent domain entered the following judgment:

"In this case the claim of the Western Union Tel. Co. to have condemned certain lands and property named in the application, to-wit:—So much of the right of way of the main line of the Louisville & Nashville R. R. Co. as lies in Hancock County, Mississippi; running from a point on said right of way on the dividing line between the counties of Hancock and Harrison on the bridge crossing the Bay of St. Louis on the East and thence extending through the county of Hancock to the head of the stream of East Pearl River, which is the

western boundary of the State of Mississippi, separating same from the State of Louisiana; being a distance of seventeen (17) miles more or less, and which said route is shown or delineated on a map or blue print annexed to petitioner's petition marked Exhibit "A". The said right of way being about one hundred (100) feet wide, and constituting together with that portion of the bridge over the Bay of St. Louis lying in Hancock County, and that portion of the East Pearl River bridge lying in the State of Mississippi, one continuous and contiguous strip and body of land and track extending from the Harrison County line on the east, to the Louisiana line on the west,, and being the right of way over which the main line of said defendants between New Orleans and Mobile is now constructed and being operated. Together with the right to attach poles, cross arms and wires to such portions of the bridges over Bay St. Louis and East Pearl River above mentioned, as lie within said Hancock County, in
12 such convenient and proper way, and by such proper and prudent means, as will in no wise endanger or impair said bridges, and will in no wise, hamper, impede, obstruct, or interfere with the use thereof by defendants, and all others authorized to use same. This condemnation being for the purpose of permitting said Western Union Tel. Co. to erect one line of poles with cross arms and wires upon and along said right of way and bridges of said defendant, all in the manner and with all the safeguards set forth in petitioner's petition, that is to say, in such manner and at such distance from defendants' track as in no way to interfere with the operation of trains of said defendants, or with any proper or legitimate use thereof by defendants, or the use by any telegraph or telephone company now existing thereon, and so as not to be dangerous to persons or property, and subject to all the stipulations and agreements in said petition contained, being the property of the L. & N. R. R. Co. and the N. O. M. & T. R. R. Co., as re-organized, and in which the Farmers Loan & Trust Co. is interested as the Trustee in certain mortgages, was submitted to a jury composed of: J. P. Adams, Elmer Bourgeois, A. A. Hart, C. L. Joyner, Alfred Koenan, Salvator Nicaise, Alfred Besancon, Thos. J. Conway, G. H. Vairin, Emile Pene, Louis Tricon, and H. W. Driver, on the 8th and 9th days of Jan., A. D. 1912, and the jury returned a verdict fixing the defendants' due compensation and damages at six hundred and fifty dollars, and the verdict was received and entered. Now upon payment of said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application.

Let the applicant pay the costs for which let execution issue.

Jan. 9, 1912.

(Signed) J. A. BREATH,
Justice of the Peace."

The Defendant, the Western Union Telegraph Company, thereafter tendered to Complainant, the amount of damages so adjudged, with interest, but the same was not accepted by the Complainant.

On the 10th day of January, 1912, the said Charles E.
13 Chidsey, Justice of the Peace as aforesaid, together with the

jury drawn, met at the Court House of Jackson County, and organized what purported to be a Special Court of eminent domain.

Before said alleged court of eminent domain proceeded to take testimony, the Defendant protested against proceeding with the hearing of the application of the Defendant to condemn any portion of the right of way of the Complainant, upon the ground that no competent Justice of the Peace had been appointed by an endorsement upon Complainant's application for condemnation, and that the said Chas. E. Chidsey was therefore without jurisdiction or authority to proceed in said matter. The said alleged court of eminent domain disregarded said protest, and proceeded to hear the evidence as to the value of the property to be taken, and after said evidence had been heard, the jury rendered a verdict in the following language:

"We the jury find that the Defendants, the New Orleans, Mobile & Texas Railroad Company, as Re-organized, the Louisville & Nashville Railroad Company, and the Farmers Loan & Trust Company, will be damaged by the taking of their property for public use, in the sum of $150.00."

Said verdict was signed by all the jurors.

Upon the return of said verdict, the said court of eminent domain entered the following judgment:

"STATE OF MISSISSIPPI,
Jackson County:

Special Court of Eminent Domain.

WESTERN UNION TELEGRAPH COMPANY
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY et als.

In this case, the claim of the Western Union Telegraph Company to have condemned certain lands and property named in the application, to-wit—So much of the right of way of the main line of the Louisville & Nashville Railroad Company, as lies in Jackson County, Mississippi, running from a point on the right of way of said Railroad Company on the dividing line between the States of
14 Alabama and Mississippi, near Pecan Station on the East, thence extending through the County of Jackson to the dividing line separating the Counties of Jackson and Harrison in the State of Mississippi, being a distance of twenty-two (22) miles more or less, and which said route is shown and delineated on a map or blue print filed with petitioner's petition marked Exhibit "A," excepting so much thereof as consists of bridges in said Jackson County. Said right of way being one hundred (100) feet wide, and constituting the right of way of said Railroad Company lying in Jackson County, Mississippi, and extending from the Alabama line on the East to the Harrison County line on the West, being the right of way over which the main line of said Railroad between New

Orleans and Mobile is now constructed and being operated, excepting so much thereof as consists of bridges in said Jackson County.

This condemnation being for the purpose of permitting said Western Union Telegraph Company to erect one line of poles with cross arms and wires upon and along said right of way and bridges of said defendant, all in the manner and with all the safeguards set forth in petitioner's petition, that is to say—in such manner and at such distance from defendant's track as in no way to interfere with the operation of trains of said defendants or with any proper or legitimate use thereof by defendants, or the use by any telegraph or telephone company now existing thereon and so as not to be dangerous to persons or property, and subject to all the stipulations and agreements in said petition contained, being the property of the Louisville & Nashville Railroad Company, and in which the Farmers Loan & Trust Company is interested as the Trustee in certain mortgages was submitted to a jury composed of—

15 on the 10th and 11th days of January, A. D. 1912, and the jury returned a verdict fixing the defendants' due compensation and damages at One hundred and fifty dollars ($150.00) and the verdict was received and entered. Now upon payment of said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application.

Let the applicant pay the costs for which let execution issue."

———•———,

Justice of the Peace.

Jan. 11, 1912.

IX.

Chapter 43 of the Code of Mississippi provides, as hereinabove shown, for the creation of a special statutory court of eminent domain, but said court, under said provisions, can be created and given jurisdiction only by proceeding in strict conformity with the provisions of said chapter. By the provisions of said chapter, hereinabove set out, authority is conferred upon the Clerks of said several courts to appoint a competent Justice of the Peace to serve as part of a special court of eminent domain, and to cause a jury to be drawn and summoned, but does not confer such powers upon the Deputies of such Clerks, or upon any other person.

Said Chapter 43 authorizes and empowers the said Clerks of the Circuit Courts to appoint a competent Justice of the Peace by endorsing the same upon the application of condemnation so presented to them, but does not authorize such Clerks to appoint such Justices of the Peace by a separate order, not endorsed upon such application.

Complainant shows to the Court that the whole proceedings for the condemnation of its right of way attempted to be had in Harrison, Jackson and Hancock Counties, are void, because the several Justices of the Peace who presided over, and acted as parts of said alleged courts of eminent domain, were not appointed by endorse-

ments made upon the applications presented by the Western Union Telegraph Company.

16 Complainant shows to the Court that in addition to this, the proceedings under which condemnation of its right of way in Jackson and Harrison Counties were attempted, were void for the further reason:

1. Because the applications by which the said proceedings purported to have been commenced, were not presented to the several Clerks of said Counties.

2. Because the Clerks of said Counties made no appointment of a competent Justice of the Peace to act in said proceedings.

X.

Complainant further shows to the Court that Chapter 43 of said Code of Mississippi, which is the chapter referred to in Section 929 of the Code of Mississippi, giving a right of condemnation to telegraph and telephone companies, prescribes the method in which eminent domain shall be exercised by persons and corporations having the power of eminent domain, but neither said chapter, nor said section 929, nor any other law of the State of Mississippi, extended the right to exercise said power of eminent domain to property which was already devoted to public use, and Complainant's said right of way was, at the time that said condemnation proceedings were instituted, still is, and for many years prior thereto has been, devoted to public use, viz., to the use of Complainant for the purposes of a common carrier railroad and right of way therefor.

XI.

Complainant further shows to the Court that said Western Union Telegraph Company had no power or authority to condemn, to its use, any portion of Complainant's right of way and bridges, in that:

17 (*a*) The only right which it had or claimed to have, to condemn the said right of way and bridges of Complainant was conferred upon it by Sections 925 and 929 of the Code of Mississippi of 1906, and by the provisions of Chapter 43 of said Code of Mississippi, prescribing the method in which the right of eminent domain should be exercised.

The said Section 925 of the Code of Mississippi authorizes all Companies or Associations of persons, incorporated or organized for the purpose of constructing telegraph and telephone lines, to construct the same, and to set up and erect their posts and fixtures along and across any of the public highways, streets, and waters, and along or across all turn-pikes and railroads, but it does not authorize such telegraph and telephone companies to condemn the rights of way of railroads, or to set up and erect their posts and fixtures across or along said rights of way without the consent of the said railway companies, and Complainant did not consent to the use of its right of way or bridges, or any part thereof, for the construction of said telegraph lines of the Defendant, the Western Union Telegraph Company.

(*b*) Said Section 929 of the Code of Mississippi of 1906 gave to telegraph and telephone companies the power to exercise the right of eminent domain as provided in the chapter of the Code of Mississippi on that subject, for the purpose of constructing new lines, but it did not give to such telegraph and telephone companies any right of eminent domain for the continuance and maintenance of any existing telegraph line. So much of said Section as relates to said matter reads as follows:

"Telegraph and telephone companies, for the purpose of constructing new lines are empowered to exercise the right of eminent domain as provided in the chapter on that subject."

Complainant further shows to the Court that neither under Sections 925 and 929, nor under any other law of the State of Mississippi, was there vested in the Defendant, the Western Union Telegraph Company, any right or power to condemn, to its use, any portion of the said right of way and bridges of the Complainant, the Louisville & Nashville Railroad Company, for the purpose of maintaining an existing telegraph line.

18 Complainant further shows to your Honor that although it is alleged in the several petitions of the Western Union Telegraph Company that the telegraph line for which it desired to condemn a right of way was to be a new line, in fact and in truth the said Western Union Telegraph Company did not desire said right of way for the purpose of erecting any new telegraph line nor did it intend to use the same for that purpose. It desired and intended to obtain said right of way for the purpose of maintaining its said existing telegraph line thereon. This was shown by the testimony introduced by the Defendant, the Western Union Telegraph Company, in each of said condemnation proceedings, and the said Western Union Telegraph Company had no right to condemn the property of the Defendant for said purpose.

XII.

By the 17th Section of the Constitution of Mississippi, it was and is provided as follows:

"Private property shall not be taken or condemned for public use except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law, and whenever an attempt is made to take private property for a use alleged to be public, whether the contemplated use be public shall be a judicial question, and as such determined without regard to legislative assertion that the use is public."

As heretofore alleged, the only right vested in the Complainant the Western Union Telegraph Company, by the laws of Mississippi to condemn property to its use, as it has attempted to condemn the right of way of this Complainant, was conferred upon it by Section 929 of the Code of Mississippi, and by said Section it is only authorized to condemn such property "for the purpose of constructing new lines," and a new line is constructed within the meaning of said statute—as declared by the Supreme Court of Mississippi, whenever the

telegraph company changes its route and runs its line in a
19 different route from that already occupied by it, involving the necessity of taking and occupying lands not before occupied by it.

By Section 925 of the Code of Mississippi, telegraph companies are authorized to construct their lines along and across public highways, streets and waters, and along and across turn-pikes, railroads, canals, and other public lands, but it is expressly provided that "the same shall be so constructed and placed as not to be dangerous to persons or property, or interfere with the common use of roads, streets, or waters, or with the convenience of any land owner, more than may be unavoidable."

Under the provisions of Chapter 43 of the Code of Mississippi, the several Clerks of said Circuit Courts to whom the law requires the applications for condemnation of lands to be presented, had no power or authority to hear or determine, upon the presentation of said applications to them, nor did said Deputy Clerks have any power or authority to hear or determine, upon the presentation of such applications to them:

1. Whether the use for which the Western Union Telegraph Company sought to condemn the property of the Complainant was a public use, or,

2. Whether the property of Complainant sought to be condemned by the Western Union Telegraph Company was already devoted to a public use, and whether, if so devoted, it was subject to condemnation by the said Western Union Telegraph Company for the purpose set out in its several applications, or,

3. Whether the Western Union Telegraph Company sought, by said several applications, to condemn the property of Complainant for the use of a new line, or only for the maintenance of an existing line, or,

4. Whether the construction of the said telegraph line, as proposed under said applications for condemnation, would be so placed as not to be dangerous to persons or property, or interfere with the common use of Complainant's right of way more than might be unavoidable, or,

20 5. As to what interest Complainant had in the property sought by the said Western Union Telegraph Company to be condemned.

So much of said Chapter 43 as relates to this matter is contained in Secton 1856 of the Code of Mississippi, and reads as follows:

"When any person or corporation having the right so to do shall desire to exercise the right of eminent domain, he or it shall make application therefor, in writing, and the owners of the property sought to be condemned, and mortgagees, trustees, or other persons having an interest therein, or a lien thereon, shall be made defendants thereto, which shall state with certainty the right and describe the property sought to be condemned, showing that of each defendant separately. The application shall be presented to the Clerk of the Circuit Court of the County, who shall endorse thereon his appointment of a competent Justice of the Peace of the county in

which the property, or some part thereof, is situated, to constitute, with a jury, a special court of eminent domain, and he shall fix the time and place in the county for the organization thereof."

Under Section 1858 of the Code of Mississippi, which is a part of said Chapter No. 43, the said sheriffs of the several counties were required to execute the summons and venire facias, provided for by the endorsements of the clerks as aforesaid, and make due return thereof to the Justices of the Peace, at times and places fixed; and under Section 1862 of the Code of Mississippi, which is also a part of said Chapter 43, the said Justices of the Peace were required to organize said juries, and were expressly denied the right to quash the proceedings or dismiss the court of eminent domain for any cause, and said section expressly prohibits an appeal from said proceedings until after a verdict is rendered by the jury. So much of said Section as denies to the said Justices of the Peace the right to quash the said proceedings, and prohibits an appeal until after the verdict is rendered, reads as follows:

21 "The Justice of the Peace shall not for any cause quash the proceedings or dismiss the court of eminent domain, but must proceed with the condemnation. No irregularity in drawing, summoning, or empaneling the jury shall vitiate the verdict or judgment, and no appeal or certiorari shall be allowed until after verdict by the jury."

By Section 1865 of the Code of Mississippi, which is also part of said Chapter 43, the form of the charge to be given the jury, by the Justice of the Peace, is prescribed, and said form of charge expressly submits to the jury only the determination of the amount of damages which the defendant, in the condemnation proceedings, will sustain by the taking of his or their property. The provisions of Section 1865 relating thereto, are as follows:

"The Justice shall instruct the jury, in writing, in the following words:

'The defendant is entitled to recover damages in this case, and it devolves on you honestly and impartially to estimate the sum thereof, according to the evidence adduced on the trial, the weight and credibility of which you are the sole judges. The defendant is entitled to due compensation, not only for the value of the property to be actually taken as specified in the application, but also for damages, if any, which may result to him as a consequence of the taking; and you are not to deduct therefrom anything on account of the supposed benefits incident to the public use for which the application is made.'"

Under Section 1866, which is also a part of said Chapter 43, the form of the verdict to be returned is prescribed. Said Section reads as follows:

"We, the jury, find that the defendant (naming him) will be damaged, by the taking of his property for the public use, in the sum of — dollars."

Under Section 1867, which is also a part of said Chapter 43, the form of judgment to be rendered is prescribed, and the language of said Section, in regard thereto, is as follows:

22 "Upon the return of the verdict, the court shall enter a judgment as follows, viz:

'In this case the claim of (naming him or them) to have condemned certain lands named in the application, to-wit: (here describe the property), being the property of (here name the owner) was submitted to a jury composed of (here insert their names) on the — day of ——, A. D. ——, and the jury returned a verdict fixing said defendant's due compensation and damages at — dollars, and the verdict was received and entered. Now, upon payment of the said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application. Let the applicant pay the costs for which let execution issue.' J. P."

Section 1871 of said Code, which is also a part of said Chapter 43, authorizes an appeal to the Circuit Court, from the finding of the jury of the special eminent domain court, by executing a bond, with sufficient sureties, payable to his adversary, in a penalty of $300.00, conditioned to pay all costs that may be adjudged against it, which bond is required to be given within twenty days after the rendition of the verdict, but said section expressly provides that, if the appeal be by the defendant, it shall not operate as a supersedeas, nor shall the right of the complainant to enter in and upon the land of the defendant, and to appropriate the same to public use, be delayed. So much of said Section as relates to this matter, reads as follows:

"Every party shall have the right to appeal to the circuit court from the finding of the jury in the special court by executing a bond with sufficient sureties, payable to his adversary, in a penalty of three hundred dollars, conditioned to pay all costs that may be adjudged against him, which bond shall be given within twenty days after the rendition of the verdict, and may be approved by the justice. If the appeal be by the defendant, it shall not operate as a supersedeas, nor shall the right of the applicant to enter in and upon the land of the defendant and to appropriate the same

23 to public use be delayed. Upon appeals, the issues shall be tried de novo in the circuit court, which shall try and dispose of it as other issues, and enter all proper judgments."

Upon such appeal to the Circuit Court, that Court has no jurisdiction, judicial power or authority under the statutes of the State of Mississippi, as construed by the highest court in that State, to hear, permit evidence upon, or determine the question of the right, authority, or necessity of the Western Union Telegraph Company to condemn for its telegraph line the right of way of a railroad company, or the question of obstruction or non-obstruction, interference or non-interference with the ordinary common use, traffic, or travel on the railway company's railroad laid on such right of way, or the question of the dangerousness to persons or property, which would be caused by the construction, operation, and maintenance perpetually of the telegraph company's line of poles, wires, cross-arms, fixtures, etc., on such railroad right of way as proposed, and said statutes exclude all judicial inquiry into or upon the questions afore-

said, as well as to whether or not the right of way for which th condemnation is sought is public, or as to whether or not the tel graph line for the construction, operation, and maintenance which the condemnation is sought, is a new or old line. But th jurisdiction on such appeal of the Circuit Court under said statute construed as aforesaid, is confined to the single question of reviewin the verdict of the jury before the Justice of the Peace as to th amount of damages that will be sustained by the railroad company and such Justice of the Peace likewise under said statutes, construe as aforesaid, has and exercises no judicial power or authority in co demnation proceedings before him, but acts therein as a ministeri officer only.

XIII.

Complainant shows to the court that, although the said Weste Union Telegraph Company, as hereinabove alleged and shown, ha no right to condemn any portion of Complainant's right of way its use, and although no eminent domain court was creat
24 and given jurisdiction to act upon said several applicatio of the Western Union Telegraph Company to condemn Co plainant's said right of way and bridges, or any part thereof, D fendant has, under provisions of said Section 43 of the Code Mississippi, obtained what purports to be judgments of courts of e inent domain, condemning to the use of the Western Union Te graph Company portions of the right of way and bridges of the Co plainant, the Louisville & Nashville Railroad Company, and in and said condemnation proceedings Complainant has been deprived of property without due process of law in that its said property h been condemned without its having had an opportunity to be hea as to whether the use for which the said property is so proposed be taken is a public use, or as to whether the purpose for which sa property is condemned is for the erection of a new line, or only f the maintenance of an existing line, or as to whether or not sa line is proposed to be constructed and placed so as not to be dange ous to persons and property, or so as not to interfere with the co venience of Complainant more than is unavoidable, or as to wh interest Complainant had in its said property, all in violation of t Fourteenth Amendment to the Constitution of the United Stat and Complainant here invokes the protection of the provisions said Fourteenth Amendment, and claims the right, under the p visions thereof, to have the cloud placed upon its property, by sa several alleged judgments of condemnation, removed.

XIV.

Complainant further shows to the Court that said proceedin under which said alleged judgments were rendered, were void for t following reasons:

1. Because they were not rendered by courts of eminent doma constituted as provided by law.

2. Because the property of the Defendant sought to be condemn

was already devoted to public use, and was not subject to condemnation in said proceedings.

25 3. Because the purpose for which said condemnation was sought was for the maintenance of an existing line, and not for the construction of a new line.

4. Because the Defendant was not afforded an opportunity to be heard upon said several questions.

5. Because the Defendant was not afforded an opportunity to be heard as to whether or not the construction of said new line would be dangerous to persons or property.

6. Because the Complainant was not afforded an opportunity to be heard as to whether said line would be constructed and placed so as not to interfere with the convenience of Complainant more than is unavoidable.

7. Because the Defendant was not afforded an opportunity to be heard as to what was Defendant's interest in the property sought to be condemned.

And although said several proceedings, and the judgments rendered therein, violated the Fourteenth Amendment to the Constitution of the United States in said several particulars, the said Western Union Telegraph Company intends to, and will, enter upon and take possession of a portion of Complainant's said right of way and erect its line of posts and wires, and other appliances, thereon, and attach its posts and other appliances to Complainant's bridges, claiming the right to do so under said several proceedings and alleged judgments of condemnation, unless restrained from so doing by an injunction of this Honorable Court.

XV.

Complainant shows to your Honor that the Western Union Telegraph Company is, and has been for many years, engaged in doing a corporate telegraph and cable business in the Southern Division of the Southern United States Judicial District of the State of Mississippi, and it has, for many years, had and maintained

26 offices and agents in said Division of said Judicial District.

By Section 9191 of the Code of Mississippi, it is provided as follows:

"Any corporation claiming existence under the laws of any other State or of any country foreign to the United States found doing business in this State shall be subject to suit here to the same extent that corporations of this State are, by the laws thereof, liable to be sued by any resident of this State, and also so far as relates to any transaction had in whole or in part within this State, or any cause of action arising here. And any corporation having any transaction with persons or having any transaction concerning property situated in this State, through any agency whatever, acting for it within this State, shall be held to be doing business here within the meaning of this section."

By Section 920, it is provided that, "Process may be served upon any agent of said corporation found within the county where the suit is brought, no matter what character of agent such person may be."

XVI.

The Complainant states that it is and has been for a great many years a common carrier by railroad engaged in interstate commerce as well as intrastate commerce in the State of Mississippi and among that State and other States of the United States subject to the Act of Congress to regulate commerce, approved February 4, 1887, and the amendments thereto, and its system of railroads located in Mississippi and outside of that State are military and post roads within the true intent and meaning of the Act of Congress, approved June 15, 1866. (Sec. 5258 U. S. Compiles Statutes 1901), and the Act of Congress approved June 8, 1872 (Sec. 3964 U. S. Com-
27 piled Statutes 1901), which authorized and empowered every railroad operated by steam, as Complainant's said railroads were then, have been ever since, and are now, to carry freight, passengers, troops, Government supplies, mails, and property on their way from one State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination, and which Acts were enacted under the powers vested in Congress to establish post roads and to regulate commerce among the several States, and were designed to remove trammels upon transportation between different States which had previously existed and to prevent such trammels in the future and were intended among other objects and purposes to reach trammels interposed by State enactments.

The Complainant further states that under the Act of Congress entitled "An Act to aid the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes," approved July 24, 1866, (Secs. 5263-5269, inclusive, U. S. Compiled Statutes, 1901), and the amendments thereto, the restrictions and obligations of which Act Complainant has heretofore duly accepted in writing and filed the same with the Postmaster General in accordance with the provisions thereof, and under its charter as amended it is, and has been, since a date long prior to the institution of the Defendant Western Union Telegraph Company's said condemnation proceedings, authorized and empowered in accordance with the laws of the State of Kentucky and other States, including the State of Mississippi, to own, construct, control, operate, and maintain telegraph and telephone lines on, over, and along its railroad right of way not only for the conduct of its own railroad business, but commercially as a common carrier of messages, news, intelligence, and information for the public at large, and the receipt and delivery thereof, for just and reasonable compensation or hire in all of said States, as provided by the laws thereof, and by virtue of the last mentioned Act it has the right and is duly authorized and empowered to construct, maintain, and oper-
ate lines of telegraph through and over any portion of the
28 public domain of the United States, and with their consent, along any of the military or post roads of the United States (including its own) which have been or may hereafter be declared such by Act of Congress, and over, under, or across the navigable

streams or waters of the United States, provided that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

The Complainant further states that the statutes of Mississippi are in contravention of Sub-Section 3, Section 8, Article 1 of the Constitution of the United States granting complete and exclusive power to Congress to regulate commerce among the several States, and the operation of said statutes lays a burden upon such commerce and the instrumentalities thereof such as Complainant's said railroads in the State of Mississippi and other States connected with each other so as to form continuous lines for the transportation of passengers, troops, Government supplies, mail, freight, and property on their way from one State to another, owned, used, operated, and maintained by Complainant, on, along, and over, the right of way of its said railroads employed in such commerce, and said statutes amount to and operate as a regulation of commerce among the several States, and materially and substantially trammel, obstruct, and interfere with such commerce, and are in conflict with the provisions of the Acts of Congress approved June 15, 1866, July 24, 1866, and June 8, 1872, hereinabove referred to, and are, therefore, unconstitutional and void.

Prayer.

To the end, therefore, that Complainant may have the relief which it can only obtain in a Court of Equity, and that the Defendant may answer the premises, but not upon oath or affirmation, an answer under oath being here expressly waived by the Complainant, the Complainant now prays the court that it will make an order directing that service of process may be had upon the Defend-
29 ant, the Western Union Telegraph Company, by serving the same upon any of its agents, conducting any portion of its business within the Southern Division of the Southern District of the State of Mississippi, and that process, in due form of law, according to the rules and practice of this Honorable Court, may issue against the said Western Union Telegraph Company, requiring it to appear and plead to the several allegations of this bill of complaint, within the time prescribed by the rules of equity in Federal Courts.

May it please the Court to further grant to Complainant a restraining order against the Defendant, the Western Union Telegraph Company restraining and enjoining it, from entering or erecting its poles, wires or other fixtures upon any portion of Complainant's said right of way, hereinabove described as having been condemned to its use by the Western Union Telegraph Company, and from attaching its poles or other structures to Complainant's bridges or any of them, until a motion by Complainant for an injunction pendente lite, against the use of any portion of said right of way or bridges by said Western Union Telegraph Company, can be heard and determined.

Complainant further prays that your Honor will be pleased to grant to it an injunction restraining the said Western Union Telegraph Company, during the pendency of this suit, from entering upon or using, otherwise than under an existing contract between Complainant and Defendant, any portion of Complainant's said right of way or bridges hereinabove described, for the purpose of erecting, continuing, or maintaining its telegraph poles, wires, and other fixtures, and from attaching its poles, wires, or other parts of its line, to Complainant's bridges, or any of them, until this cause is finally heard and determined.

Complainant further prays that at the hearing of this cause your Honor will be pleased to decree that the said several proceedings, for the condemnation, by the Western Union Telegraph Company, of parts of the right of way of Complainant, for the erection, by the said Western Union Telegraph Company, of its posts, wires, and appliances, and of the right to attach its poles, wires, or other parts of its line to Complainant's bridges, or any of them, may be held to be null and void as violative of the Fourteenth Amendment to the Constitution of the United States, as well as for the other reasons assigned in the bill of complaint, and that this Honorable Court will be pleased to decree said several condemnation proceedings, and the several judgments rendered therein, to be void and of no effect, and that it will permanently enjoin the said Western Union Telegraph Company from entering upon, taking possession of, or erecting any of its wires, or other appliances upon complainant's said right of way, and from attaching to Complainant's bridges, or to any of them, the said Western Union Telegraph Company's poles, wires, or other parts of its said telegraph line, after the termination, by notice or otherwise, of the contract under which it now occupies said right of way with its telegraph line.

Complainant further prays that your Honor will grant to it such other and further relief as it may be entitled to in the premises.

(Signed) GREGORY L. SMITH,
(Signed) HENRY L. STONE,
Solicitors for Complainant.

STATE OF KENTUCKY,
County of Jefferson:

Personally appeared before me, M. H. Smith, who being sworn, deposes and says that he is the President of the Louisville & Nashville Railroad Company, and as such is an officer authorized to make this affidavit upon its behalf, and that the statements contained in the foregoing bill of complaint are true.

M. H. SMITH.

Subscribed and sworn to before me this the 28th day of March, 1912.

[SEAL.] G. W. B. OLMSTEAD,
Notary Public, Jefferson County, Ky.

31 EXHIBIT "A."

THE STATE OF MISSISSIPPI,
Harrison County:

No. —.

In the Matter of THE WESTERN UNION TELEGRAPH COMPANY.
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE NEW Orleans, Mobile & Texas Railroad Company, as Reorganized; The Farmers Loan & Trust Company.

Petition for Condemnation.

To the clerk of the circuit court of said county:—

Your petitioner, the Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York, would show that it was chartered and organized for the purpose and object of owning, using, operating and maintaining lines for electric telegraphing and the transmission by wire of telegraph messages, news and information extending through the States of New York into and through other States, including the State of Mississippi. That it is now engaged in the business of telegraphing and transmitting messages, news and information between various points in the State of Mississippi, and from points inside the State of Mississippi, to points without said State, owning and operating lines for telegraphing in said States, and is now actually engaged by virtue of its charter rights, in carrying on in the State of Mississippi the business of telegraphing and the transmission by wire of telegrams, messages, news and information.

It is the desire and intention of petitioner to construct, and maintain and operate for the purposes aforesaid, a line of poles
32 with cross-arms and wires thereon, within the States of Mississippi, and in and through the County of Harrison along the right of way of the Louisville & Nashville Railroad, which is the lessee of and operating said Railroad by virtue of a lease from the New Orleans, Mobile & Texas Railroad Company, as re-organized, which is a corporation of the State of Alabama, domiciled, as petitioner is informed and believes, at Mobile, in said State; from a point on the said right of way on the line dividing the Counties of Harrison and Jackson, which said point is located in the middle of the Bay of Biloxi, and on the bridge of the defendant railroad company spanning said Bay of Biloxi on the east, and thence extending westwardly through the County of Harrison to the dividing line between said County and Hancock County on the West, which is a point in the middle of the Bay of St. Louis and on the bridge of the defendant Railroad Company spanning said Bay of St. Louis, being a distance of thirty miles more or less, and which said route is shown and delineated on a map or blue print hereto annexed marked Exhibit

"A" and prayed to be made and taken as a part hereof. Said right of way being 100 feet wide, and constituting with those portions of the bridges over the Bay of Biloxi and over the Bay of St. Louis, a continuous strip of track about thirty miles long, extending from the Jackson County line on the east to the Hancock County line on the west, and being the right of way over which the main line of said defendants between New Orleans and Mobile is now constructed and being operated. And it is further the desire and intention of petitioners to condemn the right to attach poles, cross-arms and wires above set forth, to such portions of the bridges above mentioned as lie within said Harrison County in such convenient and proper way, and by such proper and prudent means as will in no wise endanger or impair said bridges, and in no wise hamper, impede, obstruct, or interfere with the use thereof by said defendants, and others who may be authorized to use same.

The said line of poles, cross arms and wires to be constructed, and for which this condemnation is sought, being a new line.

33 That it is the purpose of your petitioners to erect one line of poles with cross arms and wires along and upon said right of way and bridges of said defendants and in such manner and at such a distance from the tracks of said defendants as in no way to interfere with the operation of the trains of said defendants, or with any proper or legitimate use thereof by defendants, or the use by any other existing telephone or telegraph companies, and so as not to be dangerous to persons or property.

Your petitioner further states that it does not seek to acquire the fee to any land or bridges included in the right of way of said defendants, or the right to use same for any other purpose than to erect poles with cross arms thereon and string wires for use in telegraphing as aforesaid, and petitioner proposes to maintain and repair the same as may from time to time be necessary, and to erect and maintain only one line of poles with cross arms thereon for said purpose. Said poles not to be less than thirty feet long and not less than one foot in diameter at the base, and to be set in the ground to a depth of not less than five feet in such a manner as to hold firmly in position, the said poles to be securely and properly braced, and said cross arms to be about eight feet in length extending about four feet on each side of said poles near the top, and all other materials used by your petitioner shall be the best, and the said line to be constructed upon the most approved plan known, or in use in this country.

And your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross arms and wires, it should become necessary for the said defendant to change the location of its tracks, or construct new tracks, or side tracks, where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be set, cross arms placed thereon and wires strung, your petitioner will, at its own expense upon reasonable notice from said defendants, remove said poles, cross arms and wires to such other point,

34 or points, on said defendant's right of way as shall be designated by said defendants.

Your petitioner recognizes fully the dominant right of said defendants in the said right of way and bridges sought to be condemned, and all it seeks in this proceeding to condemn is, an easement over same for the construction, operation, maintenance and repair of its telegraph lines, the said easement to be used now and in the future in such way as not to interfere with the proper and necessary use of said right of way by said defendants for railroad purposes.

Your petitioner would further show that it has from time to time endeavored to agree with the defendants as to the right of way which it desires by this proceeding to condemn, and said defendants, so far as your petitioner is advised and believes, being the sole owners of said right of way, or otherwise interested therein, but your petitioner has failed to reach an agreement with the said defendants, and the said defendants having refused to consent to the use of its right of way by your petitioner, your petitioner would show that by virtue of the laws of the State of Mississippi, it is authorized to condemn property for public use, and to erect its lines along and across the right of way of said defendants, and the right of way sought to be condemned in this proceeding is for public use and is necessary for the proper construction and maintenance of petitioner's line and the conduct of its business for the public use and benefit.

Your petitioner is informed, that the Farmers Loan and Trust Company, which is a corporation of the State of New York, domiciled in the City and State of New York, is the trustee in certain mortgages executed by the other defendants herein, to-wit—The New Orleans, Mobile and Texas Railroad Company, as re-organized, and the Louisville and Nashville Railroad Company, for the purpose of securing certain bonds executed and issued by the said defendant Railroad companies the said mortgages covering all of the property of the said defendants in the State of Mississippi, including its right of way and bridges above mentioned.

Premises considered, petitioner prays that upon the presentation of this application to the Clerk of the Circuit Court of Harri-
35 son County, he shall endorse thereon his application of a competent Justice of the Peace of said County to constitute, with a jury, a Special Court of Eminent Domain, and shall fix the 27th day of December, A. D. 1911, as the time, and the Court House of the said County, in the City of Gulfport, as the place in said County for the organization of said Court, and he shall issue a summons directed to the Sheriff of said County, commanding him to summons the defendants, the Louisville and Nashville Railroad Company, and that he shall issue process by publication as required by law as in the case of non-residents for the said defendants, the New Orleans, Mobile and Texas Railroad Company, as re-organized, and the Farmers Loan and Trust Company, and shall also post a copy of said process on the premises and at the door of said Court House in said County, commanding them to appear at the time and place designated, and also a summons to the Justice of the Peace named by him, to also appear at said time and place. And that the Clerk shall proceed as provided by law, to draw from the jury box of the

Circuit Court of said County the names of eighteen jurors to serve as part of said Court, and issue a Venire Facias to the Sheriff of said County, commanding him to summon jurors as drawn to appear at the time and place designated, to constitute with said Justice of the Peace, a Special Court of Eminent Domain aforesaid, to proceed and condemn the right of way of said defendants as desired by your petitioner along the right of way of the defendant's railroad.

HARRIS & POTTER,
BOWERS & GRIFFITH,
Attorneys for Petitioner.

36 THE STATE OF MISSISSIPPI,
Harrison County:

Personally appeared before me the undersigned authority in and for said County and State, L. K. McNees, who being by me first duly sworn, deposes and says that he is the Manager of the Western Union Telegraph Company at Gulfport, Mississippi, and that all and singular the facts stated in the foregoing petition are true as therein stated.

L. K. McNEES.

Sworn to and subscribed before me, this the 24th day of Nov., 1911.

[SEAL.] S. A. TOMLINSON,
Notary Public.

(Endorsed:) State of Mississippi, Harrison County. Western Union Telegraph Company vs. Louisville & Nashville Railroad Company, et als. Petition for Condemnation. Filed November 24, 1911, A. J. Ramsay, Clerk, By A. J. Ramsay, Jr., D. C. Harris & Potter, Bowers & Griffith, for Petitioners.

Summons and venire facias issued this Nov. 24, 1911.

Summons by publication issued to defendants, returnable before H. D. Moore, J. P., on Dec. 27th, 1911, published in Gulfport Daily Herald, and true copies of summons by publication mailed in Gulfport, Miss., at post office, Nov. 24th, 1911, postage prepaid, addressed to defendants as follows

Farmers Loan & Trust Company, New York City, New
37 York, and New Orleans, Mobile & Texas Railroad Company, Mobile, Ala.

A. J. RAMSAY, *Clerk,*
By A. J. RAMSAY, JR., *D. C.*

STATE OF MISSISSIPPI,
Harrison County:

I, A. J. Ramsay, Clerk of the Circuit Court of said County and State, hereby certify that the foregoing pages contain a true, correct and complete transcript of the petition for condemnation, filed on November 24th, 1911, in the case of the Western Union Telegraph Company vs. Louisville and Nashville Railroad Company, et als., to-

gether with the endorsements thereon, as the same appears and remains of record and on file in the archives of my office.

Given under my hand and official seal of said Circuit Court hereto affixed, at office in Gulfport, Miss., this the 13th day of December, 1911.

——— ———,
Clerk Circuit Court of Harrison Co.,
By ——— ———,
Deputy Clerk.

38 EXHIBIT "B."

THE STATE OF MISSISSIPPI,
Jackson County:

No. —.

In the Matter of

THE WESTERN UNION TELEGRAPH COMPANY
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE NEW Orleans, Mobile and Texas Railroad Company, as Re-organized; The Farmers Loan and Trust Company.

Petition for Condemnation.

To the Clerk of the Circuit Court of said County:

Your petitioner, the Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York, would show that it was chartered and organized for the purpose and object of owning, and using, operating and maintaining lines for electric telegraphing and the transmission by wire of telegraph messages, news and information extending through the State of New York into and through other states, including the State of Mississippi. That it is now engaged in the business of telegraphing and transmitting messages, news and information between various points in the State of Mississippi, and from points inside of the State of Mississippi, to points without said State, owning and operating lines for telegraphing in said States, and is now actually engaged by virtue of its charter rights, in carrying on in the State of Mississippi the business of telegraphing and the transmission by wire of telegrams, messages, news and information.

It is the desire and intention of petitioner to construct, maintain and operate for the purposes aforesaid, a line of poles with cross arms and wires thereon, within the state of Mississippi, and in and through the county of Jackson along the right of way of the
39 Louisville and Nashville Railroad, which is the lessee of and operating said railroad by virtue of a lease from the New Orleans, Mobile and Texas Railroad Company, as re-organized,

which is a corporation of the State of ——, domiciled, as petitioner is informed and believes, at ——, in said state; from a point on the right of way of said railroad company on the dividing line between the states of Alabama and Mississippi near Pecan station on the east, thence extending through the county of Jackson to the dividing line separating the counties of Jackson and Harrison in the state of Mississippi, which said dividing line is in the middle of the Bay of Biloxi and is a point on the bridge of the said Louisville and Nashville Railroad Company which spans said Bay of Biloxi between Ocean Springs on the east and Biloxi on the west, being a distance of twenty-two miles more or less, and which said route is shown and delineated on a map or blue print hereto annexed marked Exhibit "A" and prayed to be made and taken as a part hereof. Said right of way being 100 feet wide, and constituting, together with that portion of the bridge over the Bay of Biloxi lying in Jackson county and the bridges over the east and west Pascagoula River, the right of way of the said railroad company lying in Jackson County, Miss., and extending from the Alabama line on the east to the Harrison county line on the west, being the right of way over which the main line of said defendant between New Orleans and Mobile is now constructed and operated. And it is further the desire and intention of petitioners to condemn the right to attach poles, cross arms and wires as above set forth, to such portions of the bridges above mentioned as lie within said Jackson county in such convenient and proper way, and by such proper and prudent means as will in no wise endanger or impair said bridges, and in no wise hamper, impede, obstruct or interfere with the use thereof by said defendants, and others who may be authorized to use same.

The said line of poles, cross arms and wires to be constructed, and for which this condemnation is sought, being a new line.

That it is the purpose of your petitioners to erect one line of poles with cross arms and wires along and upon said right of way and bridges of said defendants and in such manner and at such a distance from the tracks of said defendants as in no way to interfere with the operation of the trains of said defendants, or with any proper or legitimate use thereof by defendants, or the use by any other existing telephone or telegraph Companies, and so as not to be dangerous to persons or property.

Your petitioner further states that it does not seek to acquire the fee to any land or bridges included in the right of way of said defendants, or the right to use same for any other purpose than to erect poles with cross arms thereon and string wires for use in telegraphing as aforesaid, and petitioner proposes to maintain and repair the same as may from time to time be necessary, and to erect and maintain only one line of poles with cross arms thereon for said purpose. Said poles not to be less than thirty feet long and not less than one foot in diameter at the base, and to be set in the ground to a depth of not less than five feet in such a manner as to hold firmly in position, the said poles to be securely and properly braced, and said cross arms to be about eight feet in length extending about four feet on each side of said poles near the top, and all other ma-

terials used by your petitioner shall be the best, and the said line to be constructed upon the most approved plan known, or in use in this country.

And your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross arms and wires, it should become necessary for the said defendant to change the location of its tracks, or construct new tracks, or side tracks, where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be set, cross arms placed thereon and wires strung, your petitioner will, at its own expense, upon reasonable notice from said defendants, remove said poles, cross arms and wires to such other point or points, on said defendants' right of way as shall be designated by said defendants.

Your petitioner recognizes fully the dominant right of
41 said defendants in the said right of way and bridges sought to be condemned, and all it seeks in this proceeding to condemn is an easement over the same for the construction, operation, maintenance and repair of its telegraph lines, the said easement to be used now and in the future in such way as not to interfere with the proper and necessary use of said right of way by said defendants for railroad purposes.

Your petitioner would further show that it has from time to time endeavored to agree with the defendants as to the right of way which it desires by this proceeding to condemn, and said defendants so far as your petitioner is advised and believes, being the sole owners of said right of way, or otherwise interested therein, but your petitioner has failed to reach an agreement with the said defendants, and the said defendants having refused to consent to the use of its right of way by your petitioner, your petitioner would show that by virtue of laws of the State of Mississippi, it is authorized to condemn property for public use, and to erect its lines along and across the right of way of said defendants, and the right of way sought to be condemned in the proceedings is for public use and is necessary for the proper construction and maintenance of petitioner's line and the conduct of its business for the public use and benefit.

Your petitioner is informed that the Farmers Loan & Trust Co., which is a corporation of the State of New York, domiciled in the City and State of New York, is the trustee in certain mortgages executed by the other defendants herein, to-wit, the New Orleans, Mobile & Texas Railroad Co., as re-organized, and the Louisville & Nashville Railroad Co., for the purpose of securing certain bonds executed and issued by the said defendants' railroad companies the said mortgages covering all of the property of the said defendants in the state of Mississippi, including its right of way and bridges above mentioned.

Premises considered, petitioner prays that upon the presentation of this application to the Clerk of the Circuit Court of Jackson county, he shall endorse thereon his appointment of a competent
42 Justice of the Peace of said County to constitute with a jury a special court of eminent domain, and shall fix the 10th day of January, 1912, as the time, and the Court House of the

said county, in the Town of Pascagoula, sometimes called Scranton as the place in said county for the organization of said court, and he shall issue a summons directed to the sheriff of said county, commanding him to summons the defendants, the Louisville & Nashville Railroad Co., and that he shall issue process by publication as required by law in the case of non-residents for the said defendant the New Orleans, Mobile & Texas Railroad Co., as re-organized, and the Farmers Loan & Trust Co., and shall also post a copy of said process on the premises and at the door of said court house in said county, commanding them to appear at the time and place designated, and also a summons to the Justice of the Peace named by him, to also appear at said time and place. And that the Clerk shall proceed as provided by law, to draw from the jury box of the circuit court of said county the names of 18 jurors to serve as part of said court, and issue a venire facias to the sheriff of said county, commanding him to summons jurors as drawn to appear at the time and place designated, to constitute with said Justice of the Peace, a Special court of eminent domain aforesaid, to proceed and condemn the right of way of said defendants as desired by your petitioner along the right of way of the defendants' railroad.

HARRIS & POTTER,
BOWERS & GRIFFITH,
Attorneys for Petitioner.

THE STATE OF MISSISSIPPI,
Harrison County:

Personally appeared before me the undersigned authority in and for said county and state, L. K. McNees, who being by me first duly sworn deposes and says that he is the Manager of the Western Union Telegraph Company at Gulfport, Miss., and that all and singular the facts stated in the foregoing petition are true as therein stated.

L. K. McNEES.

Sworn to and subscribed before me this the 2nd day of Nov., 19

F. H. TOMLINSON,
Notary Public.

43 EXHIBIT "C."

THE STATE OF MISSISSIPPI,
Hancock County:

No. —.

In the Matter of THE WESTERN UNION TELEGRAPH COMPANY
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE NEW Orleans, Mobile and Texas Railroad Company, as Re-organized; The Farmers Loan and Trust Company.

Petition for Condemnation.

To the Clerk of the Circuit Court of said County:

Your petitioner, the Western Union Telegraph Co., a corporation duly organized under the laws of the State of New York, would show that it was chartered and organized for the purpose and object of owning, using, operating and maintaining lines for electric telegraphing and the transmission by wire of telegraph messages, news and information extending through the state of New York into and through other states, including the state of Mississippi. That it is now engaged in the business of telegraphing and transmitting messages, news and information between various points in the State of Mississippi, and from points inside of the State of Mississippi to points without said state, owning and operating lines for telegraphing in said states, and is now actually engaged by virtue of its charter rights, in carrying on in the State of Mississippi the business of telegraphing and the transmission by wire of telegrams, messages, news and information.

It is the desire and intention of petitioner to construct, maintain and operate for the purposes aforesaid, a line of poles with cross arms and wires thereon, within the state of Mississippi, and in and through the county of Hancock along the right of way of the Louisville & Nashville Railroad, which is the lessee of and operat-
44 ing said railroad by virtue of a lease from the New Orleans, Mobile & Texas R. R. Co., as re-organized, which is a corporation of the state of Alabama, domiciled, as petitioner is informed and believes, at Mobile, in said state; from a point on said right of way on the dividing line between the counties of Hancock and Harrison on the bridge crossing the Bay of St. Louis on the east, and thence extending through the county of Hancock to the thread of the stream of East Pearl River, which is the Western boundary of the State of Mississippi, separating same from the State of Louisiana, being a distance of 17 miles more or less, and which said route is shown and delineated on a map or blue print hereto annexed marked Exhibit "A" and prayed to be made and taken as a part hereof. The said right of way being about 100 feet wide and constituting, together with that portion of the bridge over the Bay of St. Louis,

lying in Hancock county and that portion of East Pearl River lying in the State of Mississippi, one continuous and contiguous strip or body of land and tract, extending from the Harrison County line on the east to the Louisiana line on the west, and being the right of way over which the main line of said defendants, between New Orleans and Mobile is now constructed and being operated. And it is further the desire and intention of petitioners to condemn the right to attach poles, cross arms and wires as above set forth, to such portions of the bridges above mentioned as lie within said Hancock County in such convenient and proper way, and by such proper and prudent means as will in no wise endanger or impair said bridges and in no wise hamper, impede, obstruct or interfere with the use thereof by said defendants and others who may be authorized to use same.

The said line of poles, cross arms and wires to be constructed, and for which this condemnation is sought, being a new line.

That it is the purpose of your petitioner to erect one line of poles with cross arms and wires along and upon said right of way and bridges of said defendants and in such manner and at such a distance from the tracks of said defendants as in no way to interfere with the operation of the trains of said defendants, or with any proper or legitimate use thereof by defendants, or the use
45 by any other existing telephone or telegraph companies, and so as not to be dangerous to persons or property.

Your petitioner further states that it does not seek to acquire the fee to any land or bridges included in the right of way of said defendants, or the right to use same for any other purpose than to erect poles with cross arms thereon and string wires for use in telegraphing as aforesaid, and petitioner proposes to maintain and repair the same as may from time to time be necessary and to erect and maintain only one line of poles with cross arms thereon for said purpose. Said poles not to be less than thirty feet long and not less than one foot in diameter at the base, and to be set in the ground to a depth of not less than five feet in such a manner as to hold firmly in position, the said poles to be securely and properly braced, and said cross arms to be about eight feet in length extending about four feet on each side of said poles near the top, and all other materials used by your petitioner shall be the best, and the said line to be constructed upon the most approved plan known, or in use in this country.

And your petitioner further stipulates and agrees that if, at any time in the future, after the erection of its poles, cross arms and wires, it should become necessary for the said defendant to change the location of its tracks, or construct new tracks, or side tracks, where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be set, cross arms placed thereon and wires strung, your petitioner will, at its own expense, upon reasonable notice from said defendants, remove said poles, cross arms and wires to such other point, or points, on said defendants' right of way as shall be designated by said defendants.

Your petitioner recognizes fully the dominant right of said defendants in the said right of way and bridges sought to be con-

demned, and all it seeks in this proceeding to condemn is an easement over same for the construction, operation, maintenance and repair of its telegraph lines, the said easement to be used
46 now and in the future in such way as not to interfere with the proper and necessary use of said right of way by said defendants for railroad purposes.

Your petitioner would further show that it has from time to time endeavored to agree with the defendants as to the right of way which it desires by this proceeding to condemn, and said defendants, so far as your petitioner is advised and believes, being the sole owners of said right of way, or otherwise interested therein, but your petitioner has failed to reach an agreement with the said defendants, and the said defendants having refused to consent to the use of its right of way by your petitioner, your petitioner would show that by virtue of the laws of the State of Mississippi, it is authorized to condemn property for public use, and to erect its lines along and across the right of way of said defendants, and the right of way sought to be condemned in this proceeding is for public use and is necessary for the proper construction and maintenance of petitioner's line and the conduct of its business for the public use and benefit.

Your petitioner is informed that the Farmers Loan & Trust Co., which is a corporation of the State of New York, domiciled in the City and State of New York, is the trustee in certain mortgages executed by the other defendants herein, to-wit: the New Orleans, Mobile and Texas R. R. Co., as re-organized, and the Louisville & Nashville R. R. Co., for the purpose of securing certain bonds executed and issued by the said defendant Railroad Companies the said mortgages covering all of the property of the said defendants in the State of Mississippi, including its right of way and bridges above mentioned.

Premises considered, petitioner prays that upon the presentation of this application to the Clerk of the Circuit Court of Hancock County, he shall endorse thereon his appointment of a competent Justice of the Peace of said county to constitute, with a jury, a special court of eminent domain, and shall fix the 8th day of January, A. D. 1912, as the time, and the Court House of the said
47 County, in the City of Bay St. Louis, as the place, in said county for the organization of said court, and he shall issue a summons directed to the Sheriff of said County, commandng him to summons the defendants, the Louisville & Nashville R. R. Co., and that he shall issue process by publication as required by law as in the case of non-residents for the said defendants, the New Orleans, Mobile & Texas R. R. Co., as re-organized, and the Farmers Loan & Trust Co., and shall also post a copy of said process on the premises and at the door of said court house in said county, commanding them to appear at the time and place designated and also a summons to the Justice of the Peace named by him, to also appear at said time and place. And that the Clerk shall proceed as provided by law, to draw from the jury box of the Circuit Court of said County the names of eighteen jurors to serve as part of said court, and issue a venire facias to the Sheriff of said county, commanding him to sum-

mons jurors as drawn to appear at the time and place designated, to constitute, with said Justice of the Peace, a Special Court of eminent domain aforesaid, to proceed and condemn the right of way of said defendants as desired by your petitioner along the right of way of the defendants' railroad.

HARRIS & POTTER,
BOWERS & GRIFFITH,
Attorneys for Petitioner.

48 THE STATE OF MISSISSIPPI,
Harrison County:

Personally appeared before me the undersigned authority in and for the said County and State, L. K. McNees, who being by me first duly sworn, deposes and says that he is the Manager of the Western Union Telegraph Co. at Gulfport, Miss., and that all and singular the facts stated in the foregoing petition are true as therein stated.

L. K. McNEES.

Sworn to and subscribed before me this the 24th day of Nov., 1911.

[SEAL.] S. A. TOMLINSON,
Notary Public.

THE STATE OF MISSISSIPPI,
Hancock County:

I, W. W. Stockstill, Clerk of the Circuit Court of the County and State aforesaid, hereby certify that the foregoing six pages contain a true and correct copy of the petition of the Western Union Telegraph Company for condemnation against the Louisville & Nashville Railroad Company, et al., now on file in my office.

Given under my hand and official seal, this the 12th day of December, A. D. 1911.

[SEAL.] W. W. STOCKSTILL,
Circuit Clerk.

49 EXHIBIT "D."

STATE OF MISSSISSIPPI,
Jackson County:

No. —.

In the Matter of THE WESTERN UNION TELEGRAPH COMPANY
vs.
THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, THE NEW Orleans, Mobile and Texas Railroad Company, as Re-organized: The Farmers Loan and Trust Company.

Petition for Condemnation.

To the Clerk of the Circuit Court of said County:

Your petitioner, the Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York,

would show that it was chartered and organized for the purpose and object of owning, using, operating and maintaining lines for electric telegraphing and the transmission by wire of telegraph messages, news and information extending through the State of New York into and through other States, including the State of Mississippi. That it is now engaged in the business of telegraphing and transmitting messages, news and information between various points in the State of Mississippi, and from points inside of the State of Mississippi, to points without said State, owning and operating lines for telegraphing in said states, and is now actually engaged by virtue of its charter rights, in carrying on in the State of Mississippi the business of telegraphing and the transmission by wire of telegrams, messages, news and information.

It is the desire and intention of petitioner to construct, maintain and operate for the purpose aforesaid, a line of poles with cross arms and wires thereon, within the state of Mississippi, and in and through the County of Jackson along the right of way of the Louisville & Nashville Railroad, from a point on the right of way of said railroad company on the dividing line between the states of Alabama and Mississippi near Pecan Station on the east, thence extending through the County of Jackson to the dividing line separating the counties of Jackson and Harrison in the State of Mississippi, being a distance of twenty-two miles more or less, and which said route is shown and delineated on a map or blue print hereto anexed marked Exhibit "A" and prayed to be made and taken as a part hereof. Said right of way being 100 feet wide, and constituting the right of way of said railroad company, lying in Jackson County, Mississippi, and extending from the Alabama line on the east to the Harrison County line on the west, being the right of way over which the main line of said defendant between New Orleans and Mobile is now constructed and being operated. It is not the desire or intention of petitioner to condemn the use of any of the bridges of the Louisville & Nashville R. R. Co., lying and being in Jackson County, Miss., and petitioner expressly disclaims and abandons any intention or purpose of condemning or using any of said bridges.

The said line of poles, cross arms and wires to be constructed, and for which this condemnation is sought, being a new line. That it is the purpose of your petitioners to erect one line of poles with cross arms and wires along and upon said right of way of said defendants and in such manner and at such a distance from the tracks of said defendants as in no way to interfere with the operation of the trains of said defendants, or with any proper or legitimate use thereof by defendants, or the use by any other existing telephone or telegraph companies, and so as not to be dangerous to persons or property.

Your petitioner further states that it does not seek to acquire the fee to any land included in the right of way of said defendants, or the right to use same for any other purpose than to erect poles with cross arms thereon and string wires for use in telegraphing as aforesaid, and petitioner proposes to maintain and repair the same as may from time to time be necessary and to erect and maintain

only one line of poles with cross arms thereon for said purpose. Said poles not to be less than thirty feet long not less than one foot in diameter at the base, and to be set in the ground to a depth of not less than five feet in such a manner as to hold firmly in position, the said poles to be securely and properly braced, and said cross arms to be about eight feet in length extending about four
51 feet on each side of said poles near the top, and all other materials used by your petitioner shall be the best, and the said line to be constructed upon the most approved plan known, or in use in this country.

And your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross arms and wires, it should become necessary for the said defendant to change the location of its tracks, or construct new tracks, or side tracks, where the same do not now exist, or any other legitimate railroad use, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be, set, cross arms placed thereon and wires strung, your petitioner will, at its own expense, upon reasonable notice from said defendants, remove said poles, cross arms and wires to such other point, or points, on said defendants' right of way as shall be designated by said defendants. And if at any time said railroad company shall require in the manner and for the purposes aforesaid, its entire right of way at any point where the petitioner's line may be constructed on its right of way, the petitioner will at such point or points remove its line entirely off of said right of way at its cost and expense, upon being given reasonable notice thereof in writing.

Your petitioner recognizes fully the dominant right of said defendants in the said right of way sought to be condemned, and all it seeks in this proceeding to condemn is an easement over same for the construction, operation, maintenance and repair of its line, the said easement to be used now and in the future in such way as not to interfere with the proper and necessary use of said right of way by said defendants for railroad purposes.

Your petitioner would further show that it has, from time to time, endeavored to agree with the defendants as to the right of way which it desires by this proceeding to condemn, and said defendants, so far as your petitioner is advised and believes, being the sole owners of said right of way, or otherwise interested therein, but your petitioner has failed to reach an agreement with the said defendants, and the said defendants having refused to con-
52 sent to the use of its right of way by your petitioner, your petitioner would show that, by virtue of the laws of the State of Mississippi, it is authorized to condemn property for public use, and to erect its lines along and across the right of way of said defendants, and the right of way sought to be condemned in this proceeding is for public use and is necessary for the proper construction and maintenance of petitioner's line and the conduct of its business for the public use and benefit.

Your petitioner is informed that the Farmers Loan & Trust Co., which is a corporation of the State of New York, domiciled in the

City and State of New York, is the trustee in certain mortgages executed by the other defendants herein, to-wit, the Louisville and Nashville R. R. Co., for the purpose of securing certain bonds executed and issued by the defendant railroad companies, the said mortgages covering all of the property of the said defendants in the State of Mississippi, including its right of way and bridges above mentioned.

Premises considered, petitioner prays that, upon the presentation of this application to the Clerk of the Circuit Court of Jackson County, he shall endorse thereon his appointment of a competent Justice of the Peace of said County to constitute, with a jury, a special court of eminent domain, and shall fix the 10th day of January, 1912, as the time, and the Court House of the said county, in the town of Pascagoula, sometimes called Scranton, as the place in said county for the organization of said court, and he shall issue a summons directed to the sheriff of said county, commanding him to summon the defendants, the Louisville and Nashville R. R. Co., and he shall issue process by publication as required by law in the case of non-residents for the said defendant, the Farmers Loan & Trust Company, and shall also post a copy of said process on the premises and at the door of said court house in said county, commanding them to appear at the time and place designated, and also a summons to the Justice of the Peace named by him, to also appear at said time and place. And that the Clerk shall pro-
53 ceed as provided by law, to draw from the jury box of the circuit court of said county the names of eighteen jurors to serve as part of said court, and issue a venire facias to the sheriff of said county, commanding him to summons jurors as drawn to appear at the time and place designated, to constitute, with said Justice of the Peace, a Special Court of eminent domain aforesaid, to proceed and condemn the right of way of said defendents as desired by your petitioner along the right of way of the defendants' railroad.

HARRIS AND POTTER,
BOWERS AND GRIFFITH,
Attorneys for Petitioner.

THE STATE OF MISSISSIPPI,
Harrison County:

Personally appeared before me the undersigned authority in and for said county and state, L. K. McNees, who being by me first duly sworn deposes and says that he is the manager of the Western Union Telegraph Company at Gulfport, Mississippi, and that all and singular the facts stated in the foregoing petition are true as therein stated.

L. K. McNEES.

Sworn to and subscribed before me this the 20th day of November, 1911.

F. H. TOMLINSON,
Notary Public.

Indorsed on the back of the foregoing paper is the following: "No. 117, U. S. District Court for Southern Division of Southern District of Mississippi. L. & N. R. R. Co., vs. Western Union Telegraph Co. Original Bill. Filed April 27, 1912; L. B. Moseley, Clerk, by Roy Chinn, Deputy, Gregory L. Smith, H. L. Stone for Complainant."

54 UNITED STATES OF AMERICA:

In the District Court for the Southern Division of the Southern District of Mississippi.

LOUISVILLE-NASHVILLE RAILROAD CO.
vs.
WESTERN UNION TELEGRAPH COMPANY.

Special Demurrer.

Comes the defendant, the Western Union Telegraph Company, for the special purpose and no other, until the question herein raised is decided of objecting to the jurisdiction of this court, by protestation, and confessing or acknowledging all or any part of the matters or things in said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, demurs to the said bill and for cause of demurrer shows:

1. Because it appears from the face of the bill that neither the plaintiff nor the defendant is a citizen, resident or inhabitant of the southern division of the southern district of Mississippi.

2. Because Section 919 of the code of the State of Mississippi, set out and relied upon in said bill as conferring jurisdiction upon this court, does not confer jurisdiction and could not. The jurisdiction of this court being determined by the constitution and laws of the United States.

3. Because the said section 919 applies only *the* suits brought by residents of the State of Mississippi against foreign corporations in the state courts, and was not intended, in any way, to effect
55 the jurisdiction of the Federal courts or suits brought therein.

4. Fir other reasons apparent.

Respectfully submitted,

J. B. HARRIS AND
BOWERS AND GRIFFITH,
Attorneys for the Defendant,
Western Union Tel. Co.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

——— ———.

Indorsed on the back *for* the foregoing paper, is the following: "No. 117. Louisville and Nashville Railroad Co. vs. The Western Union Telegraph Co. Special Demurrer. Filed June 28th 1912. L. B. Moseley, Clerk. By Roy Chinn, Dep." J. B. Harris and Bowers & Griffith, Att'y- for Defd.

56 UNITED STATES OF AMERICA:

In the District Court of the United States for the Southern Division of the Southern District of Mississippi.

LOUISVILLE & NASHVILLE R. R. Co.
vs.
WESTERN UNION TELEGRAPH Co.

The special demurrer of defendant to the jurisdiction of the court having been set down for hearing by complainant and coming on for hearing by agreement at Kosciusko, Mississippi, on this 9th day of July, A. D. 1912, and the court having heard said demurrer and the argument of counsel for complainant and defendant thereon, and finding that defendant is a corporation inhabitant and resident of the State of New York and that Complainant is a corporation and resident of the State of Kentucky and that the said bill is not a bill to remove clouds from title to lands in the division and district aforesaid and that this court has no jurisdiction over the defendant in this suit, and that defendant is not suable in this case in this district or division but is suable only in the district whereof it is an inhabitant, it is therefore, ordered, adjudged, and decreed that said demurrer be and it is hereby sustained and said bill dismissed at the costs of complainant.

Ordered, adjudged and decreed at Kosciusko, Mississippi, this 9th day of July, A. D. 1912.

(Signed) H. C. NILES, *Judge*.

July 9th, 1912.

Endorsed on the back of the foregoing paper is the following:—"Filed July 13th, 1912. L. B. Moseley, Clerk, By Roy Chinn, Deputy Clerk."

57 In the United States District Court for the Southern Division of the Southern District of Mississippi.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Defendant.

The above named complainant, conceiving itself aggrieved by the decree rendered in the above entitled cause on the 9th day of July, 1912, and filed July 13th, 1912, whereby it was decreed that the said United States District Court was without jurisdiction of said cause, and that the bill of complaint be for that reason dismissed, now prays that this its appeal to the Supreme Court of the United States may be allowed for the review of the decree of the said United States District Court for the Southern Division of the Southern District of Mississippi, and that a citation in due form be issued.

That a certificate be made that the jurisdiction of said District

Court is the only question involved in said appeal, and the only question by said appeal presented for review to the Supreme Court of the United States.

And that the transcript of the record and proceedings and papers upon which said final decree was made, duly authenticated, may be sent to the said United States Supreme Court.

And now, at the time of the filing of this petition for appeal, the said Louisville & Nashville Railroad Company files an assignment of errors, setting up separately and particularly each error asserted and intended to be urged in the said United States Supreme Court, and presents herewith for approval its appeal bond.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By GREGORY L. SMITH,
HENRY L. STONE,
Its Solicitors.

58 Endorsed on the back of the foregoing paper is the following:—"No. 117. L. & N. R. R. Co. vs. Western Union Tel. Co. Filed July 25th, 1912, L. B. Moseley, Clerk, By Roy Chinn, Dep. Clerk."

59 The foregoing petition having been presented and duly considered, it is ordered that the appeal therein prayed be allowed: that the appeal bond presented by the said Louisville & Nashville Railroad Company with its said petition be and is hereby accepted and approved; and that the Clerk of this Court cause a duly authenticated transcript of the record, proceedings and papers upon which the decree appealed from was rendered to be transmitted to the Supreme Court of the United States.

And it is hereby certified that the jurisdiction of said District Court for the Southern Division of the Southern District of Mississippi of said cause was the only question determined by the decree from which the said appeal is prayed, and the only question presented by said appeal to the Supreme Court of the United States for review.

Made this the 26th day of July, 1912.

(Signed) H. C. NILES,
Judge of the United States District Court for the Southern Division of the Southern District of Mississippi.

Endorsed on the back of the foregoing paper is the following: "No. 117. L. & N. R. R. Co. v. Western Union Tel. Co. Filed Aug. 1st, 1912, L. B. Moseley, Clerk, By Roy Chinn, Dep. Clerk."

60 Supreme Court of the United States, October Term, 19—.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appellant,
vs.
THE WESTERN UNION TELEGRAPH COMPANY, Appellee.

Comes the Louisville & Nashville Railroad Company, the plaintiff in error, by its Counsel, and respectfully represents that it feels itself

aggrieved by the proceedings and decree of the United States District Court for the Southern Division of the Southern District of Mississippi, made on the 9th day of July, 1912, and filed July 13th, 1912, in the above entitled cause, and assigns error thereto as follows:

1. The Court erred in sustaining the demurrer to the bill of complaint, and in decreeing that it had no jurisdiction of said cause and in dismissing the bill of complaint for want of such jurisdiction.

2. The court erred in sustaining the demurrers to the bill of complaint and in decreeing that the bill of complaint by which said cause was commenced is not a bill to remove clouds from title to lands in the Southern Division of the Southern District of Mississippi, and that said court has no jurisdiction over the defendant in said suit and that the bill of complaint be dismissed for want of jurisdiction.

3. The court erred in sustaining the demurrer to the bill of complaint and in decreeing that the bill of complaint by which said cause was commenced is not a bill to remove clouds from title
61 to lands in the Southern Division of the Southern District of Mississippi, and that defendant is not suable in this cause in said district or division, but is suable only in the district whereof it is an inhabitant, and in dismissing the bill of complaint for want of such jurisdiction.

(Signed) GREGORY L. SMITH,
(Signed) HENRY L. STONE,
Solicitors for Plaintiff in Error.

Endorsed on the back of the foregoing paper is the following:—"No. 117 L. & N. R. R. Co. vs. Western Union Tel. Co. Filed July 25, 1912. L. B. Moseley, Clerk, By Roy Chinn, Dep. Clerk."

62 LOUISVILLE & NASHVILLE RAILROAD COMPANY, Complainant,
vs.
WESTERN UNION TELEGRAPH COMPANY, Defendant.

Know all men by these presents, That We, the Louisville & Nashville Railroad Company, as principal, and the National Surety Company, of New York, as surety, are held and firmly bound unto the defendant, the Western Union Telegraph Company, in the sum of one thousand dollars ($1,000.00), to be paid to the said defendant, for which payment well and truly to be made we bind ourselves jointly and severally, and each of our successors and assigns jointly and severally by these presents.

Sealed with our seals, and dated this the 19th day of July, 1912.

Whereas, the above named complainant, the Louisville & Nashville Railroad Company, hath prosecuted its appeal to the United States Supreme Court to reverse the final decree rendered in the above entitled suit by the District Court of the United States for the Southern Division of the Southern District of Mississippi; Nov. Therefore, the condition of this obligation is, that if the above named Louisville & Nashville Railroad Company shall prosecute its said appeal to effect and answer all costs and damages that may be ad-

judged or awarded against it, if it shall fail to make good its plea, then this obligation to be void; otherwise, in full force.

[SEAL.] LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By W. L. MAPOTHER, *First Vice-President.*

Attested by
M. K. GILBERT,
Assistant Secretary.

[SEAL.] NATIONAL SURETY COMPANY OF NEW YORK,
By A. C. TONSMEIRE, *Res'd't Vice-Pres'd't.*

Attested by
ALEXANDER McKINSTRY.

63 Taken and approved by me this the 26th day of July, 1912.

(Signed) H. C. NILES,
Judge of the District Court for the Southern District of Mississippi.

Endorsed on the back of the foregoing paper is the following:—"No. 117. L. & N. R. R. Co. vs. Western Union Tel. Co. Filed July 25th, 1912. L. B. Moseley, Clerk, by Roy Chinn, Dep. Clerk."

64 To the Western Union Telegraph Company, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court at Washington within thirty days from the date hereof, pursuant to an order, allowing the appeal, filed in the Clerk's Office of the United States District Court for the Southern Division of the Southern District of Mississippi, wherein the Louisville & Nashville Railroad Company is appellant and you are appellee, to show cause, if any there be, why the decree made against the said appellant should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry C. Niles, Judge of the United States District Court for the Southern Division of the Southern District of Mississippi, this the 26th day of July, in the year of our Lord nineteen hundred and twelve.

(Signed) H. C. NILES,
Judge of the United States District Court for the Southern Division of the Southern District of Mississippi.

We hereby acknowledge the receipt of a copy of the foregoing citation, and hereby accept service thereof for the defendant in error, The Western Union Telegraph Company, this the 2nd day of August, 1912.

(Signed) J. B. HARRIS,
(Signed) BOWERS & GRIFFITH,
Solicitors for the Defendant in Error, The Western Union Telegraph Company.

Endorsed on the back of the foregoing paper is the following:—"No. 117. L. & N. R. R. Co. vs. Western Union Tel. Co. Filed Aug. 1st, 1912, L. B. Moseley, Clerk, by Roy Chinn, Dep. Clerk."

65 In the United States District Court for the Southern Division of the Southern District of Mississippi.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
WESTERN UNION TELEGRAPH COMPANY.

To the Clerk of the United States District Court for the Southern Division of the Southern District of Mississippi:

The Appellant, the Louisville & Nashville Railroad Company, desires a transcript of the record in said cause, which is to be sent to the Supreme Court of the United States, pursuant to the appeal taken to said Court by the complainant from the decree of the said District Court sustaining demurrers to the jurisdiction of said Court, and dismissing the bill of complaint, to consist of the following portions of said record:

1. The original bill of complaint filed in said cause, with the exhibits thereto attached.
2. Special demurrers filed by the defendant to the jurisdiction of the court.
3. The decree of the court sustaining the demurrers to the jurisdiction of the court in dismissing the bill of commplaint.
4. The petition for an appeal and the allowance thereof.
5. The assignment of error filed with the petition for appeal.
6. The appeal bond filed.
7. The citation of appeal with acknowledgment of service thereof.
8. This præcipe.

(Signed) GREGORY L. SMITH,
(Signed) HENRY L. STONE,
Solicitors for Complainant.

66 We hereby acknowledge service of a copy of the foregoing præcipe this the 2nd day of Aug., 1912.

(Signed) J. B. HARRIS,
(Signed) BOWERS & GRIFFITH,
Solicitors for Defendant,
Western Union Telegraph Company.

Endorsed on the back of the foregoing paper is the following: "No. 117. L. & N. R. R. Co. vs. Western Union Tel. Co. Filed Aug. 1st, 1912. L. B. Moseley, Clerk, by Roy Chinn, Dep. Clerk."

67 United States District Court for the Southern Division of the Southern District of Mississippi.

LOUISVILLE & NASHVILLE RAILROAD COMPANY
vs.
WESTERN UNION TELEGRAPH COMPANY.

I, L. B. Moseley, Clerk of the United States District Court for the Southern Division of the Southern District of Mississippi, do hereby certify that the foregoing pages, numbered from 1, to 66, inclusive, contain a full, true and correct transcript of the record and proceedings in the case of Louisville & Nashville Railroad Company, vs. Western Union Telegraph Company, numbered 117 in Equity, as the same appear of record in the office of the Clerk of said court.

Witness my hand and official seal hereunto affixed, this the 20th day of August, A. D. 1912.

[Seal U. S. District Court, Southern District of Mississippi.]

L. B. MOSELEY,
Clerk of the United States District Court for the Southern Division of the Southern District of Mississippi,
By ROY CHINN, *Deputy.*

Endorsed on cover: File No. 23,344. S. Mississippi D. C. U. S. Term No. 769. Louisville & Nashville Railroad Company, appellant, vs. The Western Union Telegraph Company. Filed September 3d, 1912. File No. 23,344.

12

Supreme Court of the United States

OCTOBER TERM 1912

No. 337

LOUISVILLE & NASHVILLE RAILROAD CO.,
Appellant,

vs.

WESTERN UNION TELEGRAPH COMPANY,
Appellee.

APPLICATION TO ADVANCE THE CAUSE.

J. E. DUVAL & CO., MOBILE

Supreme Court of the United States

OCTOBER TERM 1912

No. 769

LOUISVILLE & NASHVILLE RAILROAD CO.,
Appellant,

vs.

WESTERN UNION TELEGRAPH COMPANY,
Appellee.

TO THE HONORABLE, THE JUDGES OF THE SUPREME COURT OF THE UNITED STATES.

Comes the Appellant, the Louisville and Nashville Railroad Company, through its Counsel, and shows to the Court that the above entitled case was brought to this Court by an appeal taken from a decree of the Honorable District Court for the Southern Division of the Southern District of Mississippi, sitting in equity, dismissing the bill of complaint for want of jurisdiction in said Court. A brief statement of the matter involved is hereto attached and made part hereof, and the reason for the application is that the only question in issue is the jurisdiction of the Court below.

Wherefore, Appellant moves the Court to advance the hearing of said cause, as provided by Rule 32 of this Honorable Court.

GREGORY L. SMITH,
H. L. STONE,
Solicitors for Appellant.

STATEMENT OF THE CASE.

This appeal is taken from a decree of the United States District Court for the Southern Division of the Southern District of Mississippi, sustaining a demurrer to, and dismissing a bill of complaint in equity, filed by the Appellant, the Louisville & Nashville Railroad Company, against Appellee, the Western Union Telegraph Company. The question raised by the demurrer was want of jurisdiction of the person of the Defendant. Rec. p. 37 (*57.)

The order allowing the appeal contains a certificate that the jurisdiction of the District Court was the only question determined by the decree from which the appeal was prayed, and is the only question presented for the determination of the Supreme Court upon such appeal, and it is the only question presented by the assignment of error. Rec. p. 38 (*59.)

Appellant (Complainant in the bill) is a corporation created by and organized under the laws of Kentucky, while Appellee (the Defendant in the bill) is a corporation created by and organized under the laws of New York. The purpose of the bill is to enforce a claim by Appellant (Complainant) to the exclusive possession and use of its railroad rights of way in the Counties of Jackson, Harrison and Hancock, in the State of Mississippi, and to cancel, as clouds upon Appellant's title to such rights of way, three judgments obtained by Appellee in eminent domain proceedings purporting to confer upon Appellee the right to take possession of and use parts of Appellant's said rights of way. These rights of way are all situated in the judicial district and division in which the bill of complaint was filed. Rec. p. 1 (*2).

The contentions presented by the demurrers are:

1. That the bill of complaint could only be filed in the district whereof either the Complainant (Appellant), or Defendant (Appellee) was an inhabitant.

2. That Section 919 of the Code of Mississippi of 1906 is relied upon to confer jurisdiction, and that it did not confer jurisdiction upon any federal court.

3. For other reasons apparent. Rec. p. 36 (*54).

The propositions urged in the lower Court under this ground of demurrer were:

1st. That the judgments sought to be canceled are void upon the faces of the several proceedings in which they were rendered, and do not, therefore, constitute clouds upon Complainant's (Appellant's) title to its rights of way.

2nd. That each application for condemnation alleges in substance as follows:

> "Your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross-arms and wires, it should become necessary for the said defendant **to change the location of its tracks or construct new tracks, or side-tracks,** where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be, set, cross-arms placed thereon, and wires strung, your petitioner will, at its own expense, upon reasonable notice from said defendants, remove said poles, cross-arms and wires **to such other point or points on said** defendant's right of way as shall be designated by said defendants." Rec. p. 30 (*45).

That under these allegations the use of Appellant's right of way cannot damage it, and that a muniment of title to the property of another that results in no damage does not constitute an incumbrance or cloud upon the title thereto.

Section 929 of the Code of Mississippi purports to confer upon telegraph companies the right to condemn parts of railroad rights of way for the construction of **new** telegraph lines. It reads as follows:

> "Telegraph and telephone companies, for the purpose of constructing new lines, are empowered to exercise the right of eminent domain, as provided in the chapter on that subject. And interurban street railways, for the purpose of constructing new lines between cities, towns or villages, may exercise the right of eminent domain as provided in the chapter on that subject, to condemn property between such cities, towns or villages."

The bill alleges that the proceedings were for the pur-

pose of condemning a right of way for the continued maintenance of a line of telegraph, already existing upon such right of way, and that there was no law authorizing condemnation for such a purpose. Paragraph V of the bill of complaint, Rec. p. 3 (*4).

The procedure for such condemnation is prescribed by Chapter 43 of the Code of Mississippi, and Section 1856, which is part of Chapter 43, prescribes that the proceedings shall be commenced by presenting an application for such condemnation to the clerk of the Circuit Court of the county where the property sought to be condemned lies, and requires such clerk to endorse thereon the appointment of some competent justice of the peace to constitute, with a jury, a special court of eminent domain. The clerk is also required to fix a time and place for the organization of such court.

Section 1856 reads as follows:

> "When any person or corporation having the right so to do shall desire to exercise the right of eminent domain, he or it shall make application therefor in writing, and the owners of the property sought to be condemned and mortgagees, trustees, or other persons having an interest therein or a lien thereon, shall be made defendants thereto, which shall state with a certainty the right and describe the property sought to be condemned, showing that of each defendant separately. The application shall be presented to the clerk of the Circuit Court of the county, who shall indorse thereon his appointment of a competent justice of the peace of the county in which the property or some part thereof, is situated, to constitute, with a jury, the special court of eminent domain; and he shall fix the time and place in the county for the organization thereof."

The bill further shows that the application to condemn rights of way in Jackson and Harrison Counties were not presented to the clerks of the Circuit Courts of those counties, but to the deputy clerks, and that such deputy clerks—and not the clerks—made orders, appointing justices of the peace and fixing times and places for the organization of the emi-

nent domain courts. Paragraph VII of the bill of complaint Rec. pp. 3 and 4 (*5 and 6).

In Hancock County the application was presented to the clerk of the Circuit Court and he made an order appointing a justice of the peace and fixing the time and place for the organization of the eminent domain court. Par. VII of the bill of complaint, Rec. p. 4 (*7). In each instance the order was made by a separate writing and was not endorsed upon the application. Par. VII of the bill of complain, Rec. pp. 3, 4, 5 (*5, 6, 7).

Subsequent to the making of these orders and before the organization of the eminent domain court under them, the clerks of the Circuit Courts of Jackson and Hancock Counties, each endorsed upon the application for condemnation in his county, a statement that he had previously made an order, appointing a justice and fixing a day for the organization of an eminent domain court and that he then made an endorsement upon the application to further evidence the making of such order. Par. VII of the bill of complaint; Rec. pp. 4 and 5 (*6 and 7). No such endorsement was made by the clerk of the Circuit Court of Jackson County.

The bill charges that the judgments in Jackson and Harrison Counties are void for the further reason that the deputy clerks had no power to appoint justices of the peace or fix the time and place for the organization of courts of eminent domain. Chapter 43 of the Code of Mississippi prescribes the exact form of the organization of the court; the charge to be given the jury; the verdict to be rendered by them; the form of their verdict, and of the judgment to be rendered by them. Par. IX of the bill of complaint; Rec. p. 10 (*15). These provisions are found in Sections 1862, 1865, 1866 and 1867 which are as follows:

"Section 1862. When an issue shall be read for trial, a jury of twelve men shall be organized. Each party shall be allowed four peremptory challenges, and as many more as he can show cause for; and whatever is cause for challenge in the Circuit Court shall be cause in the special

court. The alphabetical list of jurors shall be called in regular order until the jury shall be completed, or until it be exhausted; and if it be exhausted before a jury is obtained, the sheriff shall summon qualified jurors of the county from the bystanders until the jury be complete; but it shall be a cause of challenge to any person offered as a juror that he had, directly or indirectly, contrived to be summoned as such, or had come to any place that he might be so summoned. The jurors drawn who are not empaneled shall not thereby be discharged, if there be other issues to be tried, but shall remain in attendance on the Court. While being impaneled each juror may be sworn truthfully to answer all questions that may be propounded to him. **The justice of the peace shall not for any cause quash the proceedings or dismiss the court of eminent domain, but must proceed with the condemnation. No irregularity in drawing, summoning, or empaneling the jury shall vitiate the verdict or judgment, and no appeal or certiorari shall be allowed until after verdict by the jury."** Par. XII of the bill of complaint; Rec. p. 14 (*21).

"Section 1865. The justice shall instruct the jury, in writing, in the followig words: 'The defendant is entitled to recover damages in this cause, and it devolves on you honestly and impartially to estimate the sum thereof, according to the evidence adduced on the trial, the weight and credibility of which you are the sole judges. The defandant is entitled to due compensation, not only for the value of the property to be actually taken as specified in the application, but also for damages, if any, which may result to him as a consequence of the taking; and you are not to deduct therefrom anything on account of the supposed benefits incident to the public use for which the application is made.' The instruction shall be signed by the justice, be filed, and become a part of the record." Par. XII of the bill of complaint; Rec. p. 14 (*21).

"Section 1866. The verdict of the jury shall be in the following form: 'We, the jury, find that the defendant (naming him) will be damaged, by the taking of his property for the public use, in the sum of ------ dollars', and it shall be signed by each of them. In case an informal or unsigned verdict be returned, it may be amended. Upon the rendition of a verdict, the jurors, other than those selected from the bystanders, shall not be discharged

if there be other issues to be tried." Par. XII of the bill of complaint; Rec. p. 14 (*21).

"Section 1867. Upon the return of the verdict, the Court shall enter a judgment as follows, viz:

"In this case the claim of (naming him or them) to have condemned certain lands named in the application, to wit: (here describe property), being the property of (here name the owner) was submitted to a jury composed or (here insert their names) on the ------ day of ------, A. D. ------, and the jury returned a verdict fixing said defendant's due compensation and damages at ------ dollars, and the verdict was received and entered. Now, upon payment of the said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application. Let the applicant pay the costs for which execution may issue.' ------, J. P." Par. XII of the bill of complaint; Rec. p. 15 (*22).

Section 1871 of the Code of Mississippi authorizes an appeal to the Circuit Court. Under the laws of Mississippi, as construed by the Supreme Court of that State, the persons whose property is sought to be condemned has no right to be heard either in the eminent domain proceedings or upon an appeal therefrom upon any defense he may have to the proceedings. The sole question that can be determined in such proceedings being the value of the property taken. If the property owner desires to defend against the taking of his property, he must do so by a bill in equity to cancel the judgment after it has been rendered. Par. XII of the bill of complaint; Rec. p. 15 (*22).

Vinegar Bend Lumber Co. vs. Oak Grove & Georgetown R. R. Co., 89 Miss., 117; 43 Sou. Rep., 292.

Under this law, as so construed, Appellant (Complainant) further sought by its bill to cancel the several judgments complained of.

Under Sections 5263-5269, of the United States Compiled Statutes of 1901, Congress has prescribed the terms upon which telegraph companies may occupy the rights of way of

post roads, and the bill of complaint alleges that Appellant's (Complainant's) railroad in the Counties of Jackson, Harrison and Hancock, in the State of Mississippi is a post road, and that the several states are excluded from granting to telegraph companies, rights of way over them—upon conditions other than those prescribed by Congress. The bill further seeks to cancel the judgments upon this ground. Par. XVI of the bill of complaint; Rec. p. 18 (*27).

Section 1868 of the Code of Mississippi of 1906 is part of the chapter of laws under which these proceedings were conducted and provides in part as follows:

> "Upon the return of the verdict, and entry of the judgment, if the applicant pay the defendant whose compensation is fixed by it, or tender to him the amount so found and pay the costs, he or it shall have the right to enter in and upon and take possession of the property of such defendant, so condemned and appropriate the same to the public use defined in the application."

Pursuant to this provision and to the forms of such judgment prescribed by the laws of Mississippi, each of the judgments attacked by the bill of complaint contain the following provisions:

> "Now, then, upon payment of said award, applicant can enter in and upon said property and devote it to public use as prayed for in the application." Par. VIII of the bill of complaint; Rec. pp. 7 (*10), 8 (*12), 10 (*15).

The Appellee, the Western Union Telegraph Company, after it had obtained its judgments of condemnation, tendered to Appellant, the Louisville & Nashville Railroad Company, the amount of the award fixed by such judgment. Par. VIII of the bill of complaint; Rec. pp. 7 (*10), 8 (*12).)

The demurrer to the bill of complaint was as follows:

> "Comes the Defendant, the Western Union Telegraph Company, for the special purpose and no other, until the question herein raised is decided, of objecting to the jurisdiction of this Court, by protestation, and confessing or

acknowledging all or any part of the matters or things in said bill of complaint contained to be true, in such manner and form as the same are herein set forth and alleged, demurs to the said bill and for the cause of demurrer shows:

1. Because it appears from the face of the bill that neither the Plaintiff nor the Defendant is a citizen, resident or inhabitant of the southern division of the Southern District of Mississippi.

2. Because Section 919 of the Code of Mississippi set out and relied upon in said bill as conferring jurisdiction upon this Court does not confer jurisdiction and could not. The jurisdiction of this Court being determined by the Constitution and laws of the United States.

3. Because the said Section 919 applies only to the suits brought by residents of the State of Mississippi against foreign corporations in the State Courts and was not intended in any way to affect the jurisdiction of the Federal Courts, or suits brought therein.

4. For other reasons apparent."

Rec. p. 36 (*54).

The demurrer was sustained by the District Court and the cause dismissed for want of jjurisdiction. Rec. p. 37 (*56).

The decree sustaining the demurrer to the jurisdiction of the Court was as follows:

UNITED STATES OF AMERICA,
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DIVISION OF THE
SOUTHERN DISTRICT OF MISSISSIPPI.

LOUISVILLE & NASHVILLE RAILROAD CO.

vs.

WESTERN UNION TELEGRAPH CO.

The special demurrer of Defendant to the jurisdiction of the Court having been set down for hearing by Complainant

and coming on for hearing by agreement at Kosiusko, Miss., on this, the 9th day of July, A. D. 1912, and the Court having heard said demurrer and the argument of counsel for Complainant and Defendant thereon, and finding that Defendant is a corporation inhabitant and resident of the State of New York and that Complainant is a corporation and resident of the State of Kentucky and that the said bill is not a bill to remove clouds from title to lands in the division and district aforesaid and that this Court has no jurisdiction over the Defendant in this suit, and that Defendant is not suable in this case in this district or division, but is suable only in the district whereof it is an inhabitant, it is therefore ordered, adjudged and decreed that said demurrer be and it is hereby sustained, and said bill dismissed at the costs of Complainant.

Ordered, adjudged and decreed at Koscuisko, Miss., this 9th day of July, A. D. 1912.

(Signed.) H. C. NILES, Judge.

July 9th, 1912.

The application for an appeal with the order allowing the same is:

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIVISION OF THE SOUTHERN DISTRICT OF MISSISSIPPI.

LOUISVILLE & NASHVILLE RAILROAD CO.
Complainant,

vs.

THE WESTERN UNION TELEGRAPH CO.,
Defendant.

The above named Complainant, conceiving itself aggrieved by the decree rendered in the above entitled cause on the 9th

day of July, 1912, and filed July 13, 1912 ,whereby it was decreed that the said United States District Court was without jurisdiction of said cause, and that the bill of complaint be for that reason dismissed, now prays that this, its appeal to the Supreme Court of the United States, may be allowed for a review of the decree of the said United States District Court for the Southern Division of the Southern District of Mississippi, and that a citation in due form be issued.

That a certificate be made that the jurisdiction of said District Court is the only question involved in said appeal, and the only question by said appeal presented for review to the Supreme Court of the United States.

And that the transcript of the record and proceedings and papers upon which said final decree was made, duly authenticated, may be sent to the United States Supreme Court.

And now, at the time of the filing of this petition for appeal, the said Louisville & Nashville Railroad Company files an assignment of errors, setting up separately and particularly each error asserted and intended to be urged in the said United States Supreme Court, and presents herewith for approval its appeal bond.

LOUISVILLE & NASHVILLE RAILROAD CO.,
(Signed.) By GREGORY L. SMITH,
HENRY L. STONE,
Its Solicitors.

The foregoing petition having been presented and duly considered, it is ordered that the appeal therein prayed be allowed: that the appeal bond presented by the said Louisville & Nashville Railroad Company with its said petition be, and is hereby accepted and approved; and that the clerk of this Court cause a duly authorized transcript of the record, proceedings and papers upon which the decree appealed from was rendered to be transmitted to the Supreme Court of the United States.

And it is hereby certified that the jurisdiction of said District Court for the Southern Division of the Southern Dis-

trict of Mississippi of said cause was the only question determined by the decree from which the said appeal is prayed, and the only question presented by said appeal to the Supreme Court of the United States for review.

Made this, the 26th day of July, 1912.

(Signed.) H. C. NILES,

Judge of the United States District Court for the Southern Division of the Southern District of Mississippi.

ASSIGNMENTS OF ERROR.

The following are the assignments of error:

"Comes the Louisville & Nashville Railroad Company, the plaintiff in error, by its counsel, and respectfully represents that it feels itself aggrieved by the proceedings and decree of the United States District Court for the Southern Division of the Southern District of Mississippi, made on the 9th day of July, 1912, and filed July 13, 1912, in the above entitled cause, and assigns error thereto, as follows:

1. The Court erred in sustaining the demurrer to the bill of complaint, and in decreeing that it had no jurisdiction of said cause and dismissing the bill of complaint for want of such jurisdiction.

2. The Court erred in sustaining the demurrers to the bill of complaint and in decreeing that the bill of complaint by which said cause was commenced is not a bill to remove clouds from title to lands in the Southern Division of the Southern District of Mississippi, and that said Court has no jurisdiction over the defendant in said suits and that the bill of complaint be dismissed for want of jurisdiction.

3. The Court erred in sustaining the demurrer to the bill of complaint and in decreeing that the bill of complaint by which said cause was commenced is not a bill to remove clouds from title to lands in the Southern Division of the Southern District of Mississippi, and that defendant is not suable in this cause in said district or division, but is suable only in the district whereof it is

an inhabitant, and in dismissing the bill for want of such jurisdiction."

GREGORY L. SMITH,
HENRY L. STONE,
Solicitors for Appellant.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1912.

No. 769.

LOUISVILLE & NASHVILLE RAILROAD CO., Appellant,

vs.

WESTERN UNION TELEGRAPH CO., Appellee.

To the Western Union Telegraph Company, and to Mr. Rushton Taggart, Mr. George H. Fearons and to J. B. Harris and E. J. Bowers, Counsel for the Appellee in the above entitled cause:

Notice is hereby given that on the ---------- day of ----------, 1912, a motion to advance the hearing of the said cause will be made in the Supreme Court of the United States.

A copy of said motion, together with the brief that will be filed on behalf of the Appellant upon the hearing of said cause, are herewith furnished you.

GREGORY L. SMITH,
HENRY L. STONE,
Counsel for the Appellant.

STATE OF ALABAMA, County of Mobile.

Personally appeared before me, K. Walsh, a Notary Pub-

lic in and for said State and County, Gregory L. Smith, who being sworn, deposes and says that on the ---------- day of November, 1912, he deposited in the United States Postoffice at Mobile, Alabama, postpaid, copies of the notice, motion and brief, to which this affidavit is attached, addressed as follows, viz:

One copy addressed to Mr. Rushton Taggart, at No. 195 Broadway, New York City, New York.

One copy addressed to Mr. Geo. H. Fearons, at No. 195 Broadway, New York City, New York.

One copy to Mr. J. B. Harris, Jackson, Mississippi.

Mr. Rushton Taggart and Mr. Geo. H. Fearons are the attorneys of record for Appellee in said cause.

That the postoffice address of Mr. Rushton Taggart and also Mr. Geo. H. Fearons, is No. 195 Broadway, New York City, New York.

The Affiant further deposes and says that the said several notices, so mailed, should, by due process of mail, have reached each of the said several parties to whom they are addressed, three weeks before the time fixed by the notice given them.

GREGORY L. SMITH,

Subscribed and sworn to before me this ---------- day of November, 1912.

K. WALSH,
Notary Public, Mobile County, Alabama.

ALPHABETICAL LIST OF AUTHORITIES.

1 Am. & Eng. Encyc. of Law, 975.
Bogert v. City of Elizabeth, 27 N. J. E., 568.
Canadian Pacific v. Moosehead Tel. Co., 76 Atl., 885.
Carlisle v. Carlisle, 2 Harr. 318 (Delaware).
Chapman v. Brewer, 114 U. S., 158.
Citizens' Savings & Trust Co. v. I.C.R.R.Co., 205 U. S., 46.
Code of Mississippi, Sections 550, 919, 920, 925, 1,856.
Cook v. Friley, 61 Miss., 1.
Cowley v. Northern Pacific R. R. Co., 159 U. S., 583.
Cumberland Tel. & Tel. Co. v. Yazoo & M. V. R. R. Co., 90 Miss., 686; (44 Southern Reporter, 166).
11 Cyclopedia of Law & Procedure, page 397.
15 Cyclopedia of Law & Procedure, page 812.
25 Cyclopedia of Law & Procedure, page 365.
29 Cyclopedia of Law & Procedure, page 1,433.
Day Land Co. v. State, 4 S. W., 865.
Devine v. Los Angeles, 202 U. S., 333.
Dick v. Foraker, 155 U. S., 404.
Drysdale v. B. & C. Co., 67 Miss., 534; 7 Southern Reporter,541.
Farrington v. Tourtelott, 39 Federal Reporter 739.
Gambrell Lumber Co. v. Saratoga Lumber Co., 87 Miss., 773; 40 Southern Reporter, 485.
Greely v. Lowe, 155 U. S., 58.
Harrison v. Harwood, 31 Texas, 650.
Hurley v. Board of Miss. Levee Com., 76 Miss., 141; 23 Southern Reporter, 580.
Hyde v. Minn., D. & P. Ry. Co., 123 N. W., 849.
Jellinik v. Huron Copper Co., 177 U. S., 9.
Ladew v. Tenn. Copper Co., 218 U. S., 357.
Lewis on Eminent Domain, 403, 406.
Madden v. Louisville, N. O. & T. R. R. Co., 66 Miss., 258; 6 Southern Reporter, 181.
Mechem on Public Officers, 567.
Merchants Bank v. Evans, 51 Mo., 335.
Mining Co. v. Coyne, 147 S. W., 148.
More v. Steinbach, 127 U. S., 70.
Muller v. Boggs, 25 California, 175.
McMasters v. Carothers, 1 Penn. St., 324.
Oman v. Bedford—Bowling Green Stone Co., 134 Federal Reporter, 65.

Pennsylvania Railroad Company v. Heister, 8 Penn. St., 445, 452.
Peoples Bank of N. O. v. West, 67 Miss., 729; 7 Southern Reporter, 516.
Perkins v. Baer, 68 S. W., 939.
Polliham v. Reveley, 81 S. W., 182.
Pomeroy Equity Jurisprudence, Sec. 1,399.
Pullman Palace Car Co. v. Lawrence, 74 Miss., 782; 22 Southern Reporter, 53, 55.
Reynolds v. Crawfordsville Bank, 112 U. S., 405.
Scofield v. City of Lansing, 17 Michigan, 437.
Smithers v. Smith, 204 U. S., 642.
Spurlock v. Dornan, 81 S. W., 412.
State v. New Jersey, 25 N. J. Law, 309.
Sullivan v. Y. & M. V. R. R. Co., 85 Miss., 649; 38 Southern Reporter, 33.
Sumners v. Roberts, 13 N. C., 527.
Texas Co. v. Central Fuel Oil Co., 194 Federal Reporter, 9.
Verdin v. St. Louis, 33 S. W., 480.
Vinegar Bend Lumber Co. v. Oak Grove & Georgetown R. R. Co., 89 Miss., 84; 43 Southern Reporter, 298.
Western Loan & Savings Co. v. Butte & Boston Consol. Mining Co., 210 U. S., 368.
White v. Memphis, B. & A. R. R. Co., 64 Miss., 566; 1 Southern Reporter, 730.
4 Words & Phrases, p. 3,519, 3,522.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No.....

LOUISVILLE & NASHVILLE RAILROAD COMPANY
Appellant.

vs.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellee.

BRIEF FOR APPELLANT.

SUBJECT INDEX.

1. The purpose of the bill of complaint is to enforce a claim to, and remove encumbrances and clouds from, property situate in the district where the suit is brought. Brief, page 22.

2. The judgments complained of operate to subject complainant's right of way to the use of defendant, and the only

way of testing their validity is by a bill in equity, such as that filed in this case. Brief, page 22.

Vinegar Bend Lumber Company v. Oak Grove and Georgetown R. R. Co., 89 Miss., 84 (43 Southern Reporter, 292, 298.)

3. When the suit is between citizens of different states and is to establish a claim to, or to remove encumbrances or clouds from property, it is properly brought in the United States Judicial District where the property is situated. Brief, pages 23, 25.

Dick v. Foraker, 155 U. S., 404.
Jellinik v. Huron Copper Mining Co., 117 U. S., 9.

4. Every right to or interest in land, granted to the diminution of the value of the land, but consistent with the passage of the fee of it by a conveyance, is an encumbrance upon the land. Brief, pages 23, 24.

Farrington v. Tourtelott, 39 Federal Reporter, 739.
Oman v. Bedford-Bowling Green Stone Company, 134 Federal Reporter, 65.
4th Words and Phrases, page 3,519, 3,522.

5. Section 919s and 920 of the Code of Mississippi were set out in the bill of complaint to show that no order fixing the mode of service of process upon defendant was necessary. Brief, pages 26 to 28.

6. The general, but not universal, rule is that equity will not entertain a bill to cancel, as a cloud upon the title to real estate, an instrument void on its face. In some jurisdictions the rule does not apply to cases where it requires legal learning and acumen to determine whether the instrument is valid or void upon its face. Brief, pages 28, 29.

Merchants Bank v. Evans, 51 Mo., 335.
Polliham v. Reveley, 81 S. W., 182.
Mining Company vs. Coyne, 147 S. W., 148.
Perkins v. Baer, 68 S. W., 939.
Verdin v. St. Louis, 33 S. W., 480.

In other jurisdictions, the rule is repudiated entirely. Brief, page 29.

Scoefield v. City of Lansing, 17 Michigan, 437.
Day Land Company vs. State, 4 S. W., 865.
3rd Pomeroy's Equity Jurisprudence, Sec. 1,399.

7. In other jurisdictions, the rule is changed by statute, and this is true of the State of Mississippi. Brief, pages 29 to 34.

Section 550, Code of Mississippi.
Bogert v. City of Elizabeth, 27 N. J. Eq. 568.
Cook v. Friley, 61 Miss., 1.
Peoples Bank of N. O. vs. West, 76 Miss., 729, (7 Southern Reporter, 516.)
Hurley v. Board of Mississippi Levee Commission, 76 Miss., 141, (23 Southern Reporter, 580.)
Gambrill Lumber Co. v. Saratoga Lumber Co., 87 Miss., 773, (40 Southern Reporter, 485.)

8. Where the statute of the State authorizes the cancellation of an instrument void on its face, the Federal Courts will enforce the right so given. Brief, pages 33 to 38.

Reynolds v. Crawfordsville Bank, 112 U. S., 405.
Cowley vs. No. Pac. R. R., 159 U. S., 583.
Devine vs. Los Angeles, 202 U. S., 333.
Chapman v. Brewer, 114 U. S., 158.
More v. Steinbach, 127 U. S., 70.

Upon a motion to dismiss for want of jurisdiction, the court will only consider the relief sought and not whether the allegations of the bill entitled the complainant to such relief. Brief, pages 38 to 40.

Citizens Savings & Trust Co. v. Ill. Cent. R. R. Co., 205 U. S., 46.
Western Loan & Savings Co. v. Butte & Boston Consolidated Mining Co., 210 U. S., 368.
Texas Co. v. Central Fuel Oil Co., 194 Federal Reporter, 9.

9. Where one to whom the power of eminent domain has been delegated, threatens to make a permanent appropriation of property in excess of the power granted, or, without complying with the conditions upon which the power is granted, a court of equity will prevent the threatened wrong, without regard to the question of the irreparable damage. Brief, pages 40 to 43.

Hurley v. Board of Levee Commission, 76 Miss., 141, (23 Southern Reporter, 580.)
Canadian Pacific v. Moosehead Tel. Co., 76 Atl., 885.
Hyde v. Minn., D. & P. Ry. Co., 123 N. W., 849.
Spurlock v. Dornan, 81 S. W., 412.

10. For the purpose of Federal jurisdiction, the averments of the bill as to the value of the property in controversy, will be accepted, unless upon the face of the bill the averments be manifestly false, or unless they are tested by proper motion based upon a charge of fraud upon the jurisdiction of the court. Brief, page 43.

Smithers v. Smith, 204 U. S., 642.

11. Telegraph companies possess no powers of eminent domain, except for the use of new lines. Brief, page 43.

Code of Mississippi, Section 929.
Cumberland Tel. & Tel. Co. v. Yazoo & M. V. R. R. Co., 90 Miss., 686, (44 Southern, 166.)

12. A new line is constructed within the meaning of Section 929 of the Code of Mississippi whenever the telephone company changes its route and runs its line in a different route from that already occupied by it, involving the necessity of taking and occupying lands not theretofore occupied by it. Brief, page 44.

Cumberland Tel. & Tel. Co. v. Yazoo & M. V. R. R. Co., 90 Miss., 686, (44 Southern, 166.)

13. The bill alleges that the property sought to be condemned was already occupied by a telegraph line belonging to defendant, and that the condemnation proceedings were for the purpose of maintaining upon the property, an existing line. Brief, page 44.

14. If the application alleged that the condemnation was for a new line, but it was in fact sought for the maintenance of an existing line thereon, the defense could not be set up in the eminent domain proceedings, nor in an appeal therefrom, nor in any other way than by a bill in equity to have the judgments cancelled and the telegraph company enjoined from entering under said judgments. Brief, pages 45 to 47.

Vinegar Bend Lumber Co. v. Oak Grove and Georgetown R. R. Co., 89 Miss., 84, (43 Southern, 298.)

15. In Mississippi a justice of the peace in an eminent domain proceeding acts ministerially, and the whole proceedings are special and statutory. Brief, page 47.

Sullivan v. Yazoo & M. V. R. R. Co., 85 Miss., 649, (38 Southern, 33.)

16. In such proceedings all of the material requirements of the statute must be strictly complied with, and such compliance must appear upon the face of the record. Brief, page 47.

White v. Memphis, B. & A. R. R. Co., 64 Miss., 566, (1 Southern, 730.)
Madden v. Louisville, N. O. & T. R. R. Co., 66 Miss., 258, (6 Southern, 181.)
15 CYC., page 812.
Lewis on Eminent Domain, 403, 406.

17. Section 1,856 of the Code of Mississippi requires the application for proceedings in eminent domain to be presented to the clerk of the circuit court, and requires him to appoint a competent justice of the peace, and fix a time and place for the

organization of the court, by an order endorsed upon the application, and no order was so endorsed. The orders were, in each case, made upon separate paper. Brief, pages 47, 48.

18. The act of the clerk of the circuit court in appointing a competent justice of the peace for the organization of the eminent domain court was judicial in its nature. Brief, pages 48, 49.

19. When the application is presented, the clerk must pass upon whether the application shows the right to condemn; if it does not, he has no power to make the order. Brief, page 49.

Cumberland Tel. & Tel. Co. v. Yazoo & M. V. R. R. Co., 90 Miss., 684, (44 Southern, 166.)

20. A deputy clerk cannot perform a duty imposed upon his principal involving the exercise of judgment and discretion, unless specially authorized by law to do so. Brief, pages 49 to 51.

25 CYC. 365.
1 Am. & Eng. Encyc. Law, 975.
11 CYC., 397.
29 CYC., 1,423.
Mechem on Public Officers, 567.
Penn. R. R. Co. v. Heister, 8 Penn. St., 445, 452.
McMaster v. Carothers, 1 Penn. St., 324.
Sumners v. Roberts, 13 N. C., 527.
Carlisle v. Carlisle, 2 Harr 318 (Delaware.)
Sullivan v. Y.& M.V.R.R.Co., 85 Miss., 649, (38 Southern, 33.)

21. Powers conferred upon deputy clerks of courts are confined to acts to be done by the clerks *virtute officio*, and do not extend to acts required by special statute to be done by the clerk which are not connected with his office as clerk of the court. Brief, pages 51 to 52.

Muller v. Boggs, 25 Cal., 175.
Harrison v. Harwood, 31 Texas, 650.
State v. New Jersey, 25 N. J. Law, 309.

STATEMENT OF CASE AS MADE BY THE BILL OF COMPLAINT.

The bill of complaint seeks to cancel and annul three judgments of condemnation of part of Complainant's right-of-way in the Counties of Jackson, Harrison and Hancock in the State of Mississippi, and to remove the incumbrances and clouds thereby created upon complainant's title to such right-of-way.

The bill of complaint was filed April 27th, 1912, (Record, page 36), and alleges that the Complainant is a corporation created and organized under the Laws of Kentucky and has its principal place of business in the City of Louisville, State of Kentucky, while the Defendant is a corporation created and organized under the laws of New York and has its principal place of business in the City of New York.

The first paragraph of the bill of complaint reads as follows:

> "That this is a suit between citizens of different States of the United States; viz:—Between the Louisville & Nashville Railroad Company, a citizen of the State of Kentucky, and the Western Union Telegraph Company, a citizen of the State of New York, and the amount in dispute between Complainant and Defendant, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars ($3,000.00); it is brought to enforce a claim to and to remove a cloud from the title to real property situate in the State of Mississippi, in the Southern Division of United States Southern Judicial District of said State. The real estate upon which the Complainant seeks to enforce a claim and from the title to which it seeks to remove a cloud, consists of a strip of land constituting Complainant's right-of-way, lying on each side of its main railroad track, and extending from the dividing line between the Counties of Jackson in the State of Mississippi and the County of Mobile in the State of Alabama, to the dividing line between the County of Hancock in the State of Mississippi, and the State of Louisiana, including the bridges in the Counties of Harrison and Hancock in the State of Mississippi. The property so taken is more particularly described in the

several judgment entries hereinafter set out, purporting to be judgment entries of courts of eminent domain." (Record, page 1.)

The bill also, by proper averments, shows that Complainant has title to its right-of-way by purchase, and actual occupancy for more than twenty years (Record, page 2); that the Defendant owned and maintained, and had for many years owned and maintained on Complainant's right-of-way, a telegraph line, but that its occupancy of such right-of-way, was under a contract which terminated on the 17th day of August, 1912 (Record, page 2); that the Defendant had filed three separate eminent domain proceedings to condemn the Complainant's right-of-way in Jackson, Harrison and Hancock Counties, Mississippi, to Defendant's use, for the purpose of continuing the use thereon of its existing telegraph line after the expiration of said contract (Record, page 3). Copies of the several applications by which eminent domain proceedings were commenced are made parts of the bill of complaint. (Record, pages 21 to 32).

The Statutes of Mississippi under which the eminent domain proceedings were instituted, are quoted in the bill of complaint and are as follows:—

Section 1,854, Chapter 43 of the Code of Mississippi of 1906.

> "Any person or corporation having the right to condemn private property for public use shall exercise that right as provided in this chapter and not otherwise, except as specified in the Chapter on Landings, Mills and Mill-Dams and Roads, Ferries and Bridges."

Section 1,856 which is also part of Chapter 43 of the Code of Mississippi of 1906:—

> "When any person or corporation, having the right to do so, shall desire to exercise the right of eminent domain, he or it shall make application therefor in writing, and the owners of the property sought to be condemned and the mortgagees, trustees or other persons having an interest therein or a lien

> thereon, shall be made defendants thereto and shall state with certainty the right and describe the property sought to be condemned showing that of each defendant separately. Application shall be presented to the Clerk of the Circuit Court of the County, who shall endorse thereon his appointment of a competent justice of the peace of the County in which the property or some part of it is situated, to constitute, with a jury, a special court of eminent domain; and he shall fix the time and place in the County for the organization thereof." (Record, page 3).

The Bill of Complaint further alleges that the applications made in Jackson and Hancock Counties were presented to the Deputy Clerks of the Circuit Courts of those Counties, and that they made the orders under which the proceedings were had, in writing, upon separate papers, but did not endorse such orders upon the application. The Clerk of the Circuit Court of Jackson County subsequently made an endorsement upon the application, reciting that he had previously made the statutory order by a separate writing. The application made in Hancock County was presented to the Clerk of the Circuit Court, but he also made the statutory order upon a separate paper and subsequently endorsed upon the application that he had made such order. (Record, pages 3 and 4.)

The Bill alleges the organization of the eminent domain court in these several counties and the rendition of judgment of condemnation of part of Complainant's right-of-way to use of Defendant, and the tender by the Defendant in each instance of the damages ascertained by said proceedings, and Complainant's refusal to accept the same. (Record, page 16.)

The Bill further alleges that under the Statutes of Mississippi as construed by the Supreme Court of that State, a telegraph company is only authorized to condemn the right-of-way of a railroad company for the purpose of constructing new lines, and that new lines within the meaning of said Statute as so construed are lines on different routes from those of existing lines. (Record, page 12).

The Bill of Complaint alleges that under the Laws of Mississippi, the Eminent Domain Court had no power to hear or determine:—

(1.) Whether the use for which the Western Union Telegraph Company sought to condemn the property of the Complainant was a public use;

(2.) Whether the property of Complainant sought to be condemned by the Western Union Telegraph Company was already devoted to a public use and whether, if so devoted, it was subject to condemnation by said Western Union Telegraph Company for the purposes set out in its several applications.

(3.) Whether the said Western Union Telegraph Company sought by said several applications to condemn the property of complainant for the use of a new line, or only for the maintenance of an existing line.

(4.) Whether the construction of the said telegraph line as proposed under said application for condemnation would be so placed as not to be dangerous to persons or property or interfere with the common use of complainant's right-of-way more than might be unavoidable.

(5.) As to what interest Complainant had in the property sought by the said Western Union Telegraph Company to be condemned. (Record, page 13).

The Bill of Complaint further alleges that the only question that could be heard and determined in those proceedings was the value of the land proposed to be taken; that, under the Laws of Mississippi, an appeal could have been taken from the judgment of the Eminent Domain Court to the Circuit Court, and upon appeal the issues are tried *de novo* in the Circuit Court, but that when the appeal is taken by the Defendant, it could not operate as a *supersedeas*, nor could the right of the Complainant to enter in and upon the land of the Defendant and to appropriate the same to public use, be delayed.

The Bill further alleges that said judgments of said Eminent Domain Court are void:—

(1.) Because they were not rendered by Courts of Eminent Domain constituted as provided by Law.

(2.) Because the property of Defendant sought to be condemned was already devoted to public use and was not subject to condemnation in said proceedings.

(3.) Because the purpose for which the said condemnation was sought was for the maintenance of an existing line and not for the construction of a new line.

(4.) Because the Defendant was not afforded an opportunity to be heard upon said several questions.

(5.) Because the Defendant was not afforded an opportunity to be heard as to whether or not the construction of said new line would be dangerous to persons or property.

(6.) Because the Complainant was not afforded an opportunity to be heard as to whether said line would be constructed and placed so as not to interfere with the convenience of complainant more than is unavoidable.

(7.) Because the Defendant was not afforded an opportunity to be heard as to what was Defendant's interest in the property sought to be condemned.

The Bill of Complaint further alleges that said Eminent Domain judgments authorized Defendant to enter upon and take possession of said right-of-way for the purposes for which the same were by said proceedings condemned, and that the Defendant intended to and would enter upon and take possession of said rights-of-way and operate their telegraph poles and wires thereon, unless enjoined. (Record, page 17.)

The Bill further alleges as follows:—

> "Complainant shows to your Honor that the Western Union Telegraph Company is and has been for many years, engaged in doing a corporate telegraph and cable business in the Southern Division of the Southern U. S. Judicial District, of the State of Mississippi, and it has, for many years, had and maintained offices and agents in said Division of said Judicial District."

By Section 919 of the Code of Mississippi, it is provided as follows:—

> "Any corporation claiming existence under the Laws of any other State or of any Country foreign to the United States, found doing business in this State, shall be subject to suit here to the same extent that Corporations of this State are, by the Laws thereof, liable to be sued by any resident of this State. And also so far as relates to any transaction had in whole or in part within this State, or any cause of

> action arising here, and any corporation having any transaction with persons, or having any transaction concerning property situated in this State, through any agency whatever acting for it within this State, shall be held to be doing business here within the meaning of this Section."

By Section 920, it is provided that:—

> "Process may be served upon any agent of said corporation found within the County where the suit is brought, no matter what character of agent such person may be." (Record, page 17).

The Bill prayed that the several eminent domain judgments be decreed to be void and that entries thereunder be enjoined. (Record, pages 18, 19.)

DEMURRER.

The following demurrer to the bill was filled:—

"Comes the Defendant, The Western Union Telegraph Company for the special purpose, and no other, until the question herein raised is decided, of objecting to the jurisdiction of this Court by protestation and confesses or acknowledges all or any part of the matters or things in said Bill of Complaint contained to be true, in such manner and form as the same are herein set forth and alleged, demurs to said Bill and for cause of Demurrer shows:—

(1.) "Because it appears from the face of the bill that neither the Plaintiff nor the Defendant is a citizen, resident or inhabitant of the Southern Division of the Southern District of Mississippi.

(2.) "Because Section 919 of the Code of Mississippi set out and relied upon in said bill as conferring jurisdiction upon this Court, does not confer jurisdiction and could not, the jurisdiction of this Court being determined by the Constitution and Laws of the United States.

(3.) "Because the said Section 919 applies only to the suits brought by residents of the State of Mississippi against foreign corporations in the State Court, and was not intended in any way to affect the jurisdiction of the Federal Courts or suits brought therein.

(4.) "For other reasons apparent." (Record, page 36.)

The District Court sustained the demurrer and dismissed the bill for want of jurisdiction. (Record, page 37.)

STATUTES OF MISSISSIPPI.

The statutory laws of Mississippi which affect the questions involved in this case are as follows:—Code of Mississippi, 1906.

Sec. 925 "All companies or associations of persons incorporated or organized for the purpose of constructing telegraph or telephone lines shall be authorized to construct the same, and to set up and erect their posts and fixtures along and across any of the public highways, streets, or waters, and along and across all turnpikes, railroads, and canals, and also through any of the public lands; but the same shall be so constructed and placed as not to be dangerous to persons or property, nor interfere with the common use of such roads, streets, or waters, or with the convenience of any land-owner more than may be unavoidable; and in case it shall be necessary to cross any highway, the same shall be so constructed as to cross such highway at right angles."

Sec. 1,876 gives to telegraph companies, organized under the laws of Mississippi, the right to condemn crossing over railroads.

Sec. 929. "Telegraph and telephone companies, for the purpose of constructing new lines, are empowered to exercise the right of eminent domain, as provided in the chapter on that subject. And inter-urban street railways, for the purpose of constructing new lines between cities, towns, or villages, may exercise the right of eminent domain as provided in the chapter on that subject, to condemn property between such cities, towns, or villages."

Referring to this Section, it is said by the Supreme Court of Mississippi in the case of Cumberland Tel. & Tel. Co. v. Yazoo & M. V. R. R. Co., 90 Miss., 686, (44 Sou. Reporter, 168), that:—

> "It is our view that a new line is constructed within the meaning of the statute, whenever the telephone company changes its route and runs its line in a different route than that already occupied by it, involving the necessity of taking and occupying land not heretofore occupied by them."

Code of Mississippi, 1906, Sec. 1,856, provides:—

"When any person or corporation having the right so to do shall desire to exercise the right of eminent domain, he or it shall make application therefor in writing, and the owners of the property sought to be condemned and mortgagees, trustees, or other persons having an interest therein or a lien thereon, shall be made defendants thereto, which shall state with certainty the right and describe the property sought to be condemned, showing that of each defendant separately. The application shall be presented to the Clerk of the Circuit Court of the County, who shall endorse thereon his appointment of a competent Justice of the Peace of the county in which the property, or some part thereof, is situated, to constitute, with a jury, the special court of eminent domain; and he shall fix the time and place in the county for the organization thereof."

Sec. 1,862 provides:—

"When an issue shall be ready for trial, a jury of twelve men shall be organized. Each party shall be allowed four peremptory challenges, and as many more as he can show cause for; and whatever is cause for challenge in the circuit court shall be cause in the special court. The alphabetical list of jurors shall be called in regular order until the jury shall be completed, or until it be exhausted; and if it be exhausted before a jury is obtained, the sheriff shall summon qualified jurors of the county from the bystanders until the jury be complete; but it shall be a cause of challenge to any person offered as a juror that he had, directly or indirectly, contrived to be summoned

as such, or had come to any place that he might be so summoned. The jurors drawn who are not empanneled shall not thereby be discharged if there be other issues to be tried, but shall remain in attendance on the court. While being empanneled each juror may be sworn truthfully to answer all questions that may be propounded to him. The justice of the peace shall not for any cause quash the proceedings or dismiss the court of eminent domain, but must proceed with the condemnation. No irregularity in drawing, summoning, or empanneling the jury shall vitiate the verdict or judgment, and no appeal or certiorari shall be allowed until after verdict by the jury."

Sec. 1,865 provides:—

"The justice shall instruct the jury, in writing, in the following words: 'The defendant is entitled to recover damages in this cause, and it devolves on you honestly and impartially to estimate the sum thereof, according to the evidence adduced on the trial, the weight and credibility of which you are the sole judges. The defendant is entitled to due compensation, not only for the value of the property to be actually taken as specified in the application, but also for damages, if any, which may result to him as a consequence of the taking; and you are not to deduct therefrom anything on account of the supposed benefits incident to the public use for which the application is made.' The instruction shall be signed by the justice, be filed, and become a part of the record."

Sec. 1,866 provides:—

"The verdict of the jury shall be in the following form: 'We, the jury, find that the defendant (naming him) will be damaged, by the taking of his property for the public use, in the sum of ..... dollars;' and it shall be signed by each of them. In case an informal or an unsigned verdict be returned, it may be amended. Upon the rendition of a verdict, the jurors, other than those selected from the bystanders, shall not be discharged if there be other issues to be tried."

Sec. 1,867 provides:—

"Upon the return of the verdict, the court shall enter a judgment as follows, viz: 'In this case the claim of (naming

him or them), to have condemned certain lands named in the application, to-wit; (here describe the property), being the property of (here name the owner), was submitted to a jury composed of (here insert their names) on the.....day of....., A. D., ..., and the jury returned a verdict fixing said defendant's due compensation and damages at.....dollars, and the verdict was received and entered. Now, upon payment of the said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application. Let the applicant pay the costs, for which execution may issue.

"J. P."

Sec. 1,868 provides:—

"Upon the return of the verdict and entry of the judgment, if the applicant pay the defendant whose compensation is fixed by it, or tender to him the amount so found and pay the costs, he or it shall have the right to enter in and upon and take possession of the property of such defendant so condemned, and to appropriate the same to the public use defined in the application; and in case the defendant and his attorney absent themselves from the court, the payment may be made to the clerk of the circuit court for him, and such officer shall be responsible on his bond therefor and shall be compelled to receive it."

Sec. 1,871 provides:—

"Every party shall have the right to appeal to the circuit court from the finding of the jury in the special court by executing a bond with sufficient sureties, payable to his adversary, in a penalty of three hundred dollars, conditioned to pay all costs that may be adjudged against him, which bond shall be given within twenty days after the rendition of the verdict, and may be approved by the justice. If the appeal be by the defendant, it shall not operate as a *supersedeas*, nor shall the right of the applicant to enter in and upon the land of the defendant and to appropriate the same to public use be delayed. Upon appeals, the issues shall be tried *de novo* in the circuit court, which shall try and dispose of it as other issues, and enter all proper judgments."

Sec. 550 provides:—

"When a person, not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right or title thereto, which may cast doubt or suspicion on the title of the real owner, such real owner may file a bill in the chancery court to have such conveyance or other evidence or claim of title cancelled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not; and any person having the equitable title to land may, in like cases, file a bill to divest the legal title out of the person in whom the same may be vested, and to vest the same in the equitable owner."

Sec. 919 provides:—

"Any corporation claiming existence under the laws of any other state or of any country foreign to the United States found doing business in this State, shall be subject to suit here to the same extent that corporations of this state are, by the laws thereof, liable to be sued by any resident of this state, and also so far as relates to any transaction had in whole or in part within this state, or any cause of action arising here. And any corporation having any transaction with persons or having any transaction concerning property situated in this state, through any agency whatever, acting for it within this state, shall be held to be doing business here within the meaning of this section."

Sec. 920 provides:—

"Process may be served upon any agent of said corporation found within the county where the suit is brought, no matter what character of agent such person may be; and in the absence of an agent, it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time of the transaction out of which the suit arises took place, or if the agency through which the transaction was had be itself a corporation, then upon

any agent of that corporation upon whom process might have been served if it were the defendant. The officer serving the process shall state the facts, upon whom issued, etc., in his return, and service of process so made shall be as effectual as if a corporation of this state were sued, and the process has been served as required by law; but in order that defendant corporation may also have effectual notice, it shall be the duty of the clerk to immediately mail a copy of the process to the home office of the corporation by registered letter, the postage and fees of which shall be taxed as other costs. The clerk shall file with the papers in the cause a certificate of the fact of such mailing, and make a minute thereof upon the docket, and no judgment shall be taken in the case until thirty days after the date of such mailing."

DEFENDANT'S CONTENTION.

The Defendant's contentions under its demurrer, are as follows:

(1.) That the Bill of Complaint could only be filed in the District whereof the complainant or defendant was an inhabitant.

(2.) That Section 919 of the Code of Mississippi, 1906, is relied upon to confer jurisdiction, and it did not confer jurisdiction upon any Federal Court.

(3.) For other reasons apparent.

(4.) The propositions urged in the lower courts under this ground of demurrer were:

(1.) That the judgments sought to be cancelled are void upon the faces of the several proceedings in which they were rendered, and do not therefore constitute clouds upon complainant's title to its right-of-way.

(2.) That each application for condemnation alleges in substance as follows:—

> "Your petitioner further stipulates and agrees that if at any time, in the future, after the erection of its poles, cross-arms and wires, it should become necessary for the said defendant to change the location of

its tracks or construct new tracks or side tracks where the same do not now exist, and for such purpose use or occupy that portion of said right-of-way on which petitioner's poles are or may be set, cross-arms placed thereon, and wires strung, your petitioner will, at its own expense, upon reasonable notice from said defendant, remove said poles, cross-arms and wires to such other point or points on said defendant's right-of-way as shall be designated by said defendant."

That, under these allegations, the use of appellant's right-of-way cannot damage it, and that a muniment of title to the property of another that results in no damage, does not constitute an incumbrance or cloud upon the title thereto.

For convenience, the Appellant will be spoken of as Complainant, and Appellee will be spoken of as Defendant.

ASSIGNMENTS OF ERROR.

The following are the assignments of error:—

"Comes the Louisville & Nashville Railroad Company, the Plaintiff in Error, by its counsel, and respectfully represents that it feels itself aggrieved by the proceedings and decree of the United States District Court for the Southern Division of the Southern District of Mississippi, made on the 9th day of July, 1912, and filed July 13, 1912, in the above entitled cause, and assigns error thereto as follows:—

1. The court erred in sustaining the demurrer to the bill of complaint, and in decreeing that it had no jurisdiction of said cause and dismissing the bill of complaint for want of such jurisdiction.

2. The court erred in sustaining the demurrers to the bill of complaint and in decreeing that the bill of complaint by which said cause was commenced is not a bill to remove clouds from title to lands in the Southern Division of the Southern District of Mississippi, and that said court has no jurisdiction over the defendant in said suits and that the bill of complaint be dismissed for want of jurisdiction.

3. The court erred in sustaining the demurrer to the bill of complaint and in decreeing that the bill of complaint by which said cause was commenced is not a bill to remove clouds from title to lands in the Southern Division of the Southern District of Mississippi, and that defendant is not suable in this cause in said district or division, but is suable only in the district whereof it is an inhabitant, and in dismissing the bill for want of such jurisdiction."

ARGUMENT.

I.

THE BILL IS ONE TO ESTABLISH A CLAIM TO AND REMOVE AN INCUMBRANCE AND CLOUD FROM THE TITLE TO PROPERTY.

Complainant claims the exclusive right to the use of its entire right-of-way in Jackson, Harrison and Hancock Counties, Mississippi, while Defendant claims the right to take possession of, use and occupy parts of that same right-of-way. Defendant's claim is made under the three Eminent Domain judgments, copies of which are made parts of the bill of complaint, and Complainant seeks to have these judgments decreed to be void, and Defendant enjoined from taking possession of, using and occupying Complainant's right-of-way under them.

Each judgment describes the property condemned, recites the rendition of the verdict, and concludes as follows:—

> "Now, upon payment of said award, the applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application."

These judgments operate to subject Complainant's right-of-way, to the uses of the Defendant, and the only method of testing their validity, is by a bill in equity.

> Vinegar Bend Lbr. Co. v. Oak Grove & Georgetown R. R. Co., 89 Miss., 84; 43 Sou. Rep., 292, 298.

In this case it is held:—

1. That the Eminent Domain Court has no jurisdiction to try any question except the value of the property supposed to be taken.

2. That, upon an appeal from the judgment of the Eminent Domain Court, the Appellate Court can review no other question than that which was before the Eminent Domain Court—the value of the property taken.

3. That if the owner of a property desires to test the validity of a proceeding, or the right of the party seeking the condemnation to enter under such judgment, he must do so by a bill in equity.

If the Eminent Domain judgments constitute incumbrances or clouds upon the title of Complainant's right-of-way, then, under Section 57 of the U. S. Judicial Code of 1912, the bill of complaint was properly filed in the U. S. Judicial District in which the rights-of-way condemned are situated.

In the case of Dick vs. Foraker, 155 U. S., 404, it is said:—

> "The suit was one to remove a cloud from the title to real estate situated in the district where the suit was brought. The Defendant was a citizen of another state. The case was obviously within the jurisdiction of the court."

See also:—

> Greely v. Lowe, 155 U. S., 58.
> Jellinik vs. Huron Copper Mining Co., 177 U. S., 9.
> Citizens Svg. & Trust Co. vs. Ill. Cent. R. R. Co., 205 U. S., 46.

That the judgments do constitute incumbrances upon Complainant's property seems quite clear.

In Farrington vs. Tourtelott, 39 Fed. Rep., 739, the bill was filed by the vendor to enforce the specific performance of a contract for the sale of land that was conditioned upon the vendor's having a good title, free of all liens and incumbrances. The Defendant set up that there was a railroad upon the land and that its right-of-way constituted an incumbrance. To meet this contention, the bill was amended so as to set up that

the existence of the railroad upon the land was known to the defendant when the contract was made, and was one of the things that induced him to purchase it. The bill as amended was demurred to. The Court held that the right-of-way constituted an incumbrance upon the land and said:—

> "The best recognized definition, perhaps, of the term 'Encumbrance,' is that given by Parsons, C. J., in Prescott vs. Truman, 4 Mass., 66: 'Every right to, or interest in the land granted to the dimunition of the value of the land, but consistent with the passing of the fee of it by the conveyance.'"

In Oman vs. Bedford-Bowling Green Stone Co., 134 Fed. Rep., 65, the Stone Company owned both the land and the railroad track thereon, but Oman claimed to have the right to use the railroad to haul stone over it. A bill was filed by the Stone Company to quiet its title and enjoin the use of the railroad by Oman. The Court said:—

> "The rails, ties, etc., constituting the track, were held by the Railroad Company as personal property. When bought by the Stone Company, they did not, for that reason become so immovably attached to the soil as to put it beyond the power of the Stone Company to treat them as it might see fit. It had the right to continue to use them as tracks or remove them as personal property. In other words, they became the individual property of the Stone Company applicable to whatever use it might put them. But the Omans claimed the right to use them as railroad tracks in the transportation of their freight. This was an assertion of an interest not only in the track material but in the road-bed of the right to have the tracks kept where they were, and used for the shipment of their freight. It was the claim of an easement in the real estate, and operated as a cloud upon the title of the Stone Company."

A large number of authorities to the same effect will be found in 4th "Words & Phrases," pages 3,519, 3,522.

WHERE THERE IS DIVERSITY OF CITIZENSHIP A BILL TO ENFORCE A CLAIM OR REMOVE AN INCUMBRANCE OR CLOUD FROM REAL OR PERSONAL PROPERTY IS PROPERLY FILED IN THE DISTRICT WHERE THE PROPERTY IS FOUND.

The jurisdiction of the U. S. District Court, relied upon in the Bill of Complaint and shown by appropriate allegations, rests upon diversity of citizenship and the enforcement of claims to and the removal of incumbrances and clouds from property.

Except in certain cases, a suit between citizens of different states must be brought in the District where either the Plaintiff or the Defendant resides. If there was no exception to the general venue in suits where the jurisdiction depends upon diversity of citizens, this suit could not have been maintained in the United States District Court for the Southern Division of the Southern District of Mississippi.

The general rule as to venue is prescribed by Section 51 of the Judicial Code of the U. S. of 1912, but, by the express terms of that section, cases provided for by Section 57, of the U. S. Judicial Code of 1912, are excepted from the general rule. Section 51 of the Judicial Code provides, among other things, that:—

> "Except as provided for in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Section 57 of the Judicial Code is one of the six excepted Sections and provides that:—

> "When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim, or to remove any incumbrance or lien or cloud upon the title to real or personal

> property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks."

The Bill of Complaint alleges that Complainant is a citizen of Kentucky and the Defendant a citizen of New York, and that the property to which a claim is sought to be established, and from which an incumbrance and cloud is sought to be removed, is situate in the District where the suit is brought. This brings it within the exceptions provided for by Section 57 of the U. S. Judicial Code.

SECTIONS 919 AND 920 OF THE CODE OF MISSISSIPPI, MERELY RENDERED IT UNNECESSARY TO OBTAIN A SPECIAL ORDER FOR SERVICE.

The second and third demurrer rest upon the idea that the bill of complaint relies upon Section 919 of the Code of Mississippi to confer jurisdiction upon the court. That Section reads as follows:—

> "Any corporation claiming existence under the laws of any other state or of any country foreign to the United States found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, by the laws thereof, liable to be sued by any resident of this state, and also so far as relates to any transaction had in whole or in part within this state, or any cause of action arising

here. And any corporation having any transaction with persons or having any transaction concerning property situated in this state, through any agency whatever, acting for it within this state, shall be held to be doing business here within the meaning of this section."

Section 920 of the Code of Mississippi reads as follows:—

"Process may be served upon any agent of said corporation found within the county where the suit is brought, no matter what character of agent such person may be; and in the absence of an agent, it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time of the transaction out of which the suit arises took place, or if the agency through which the transaction was had be itself a corporation, then upon any agent of that corporation upon whom process might have been served if it were the defendant. The officer serving the process shall state the facts, upon whom issued, etc., in his return, and service of process so made shall be as effectual as if a corporation of this state were sued, and the process has been served as required by law; but in order that defendant corporation may also have effectual notice, it shall be the duty of the clerk to immediately mail a copy of the process to the home office of the corporation by registered letter, the postage and fees of which shall be taxed as other costs. The clerk shall file with the papers in the cause a certificate of the fact of such mailing, and make a minute thereof upon the docket, and no judgment shall be taken in the case until thirty days after the date of such mailing."

It is, of course, conceded that neither these sections, nor any other law of the State of Mississippi, can confer jurisdiction upon the Federal Court. These particular statutes do not attempt to confer jurisdiction even upon the State Court. They merely subject a foreign corporation to suit in any Court held in Mississippi having jurisdiction, whether the suit be by a

resident or a non-resident of that state. They are only declaratory of the rule previously recognized in Mississippi that a foreign corporation doing business in a State other than that of its creation, is, in such other State, subject to suit both by a resident and a non-resident of such State.

Pullman Palace Car Co. v. Lawrence, 74 Miss., 782; 22 Sou. Rep., 53.

Under Section 919 of the Code of Mississippi a foreign corporation is merely located for the purpose of suit in Mississippi, and under Section 920, the method of service of process upon such corporation is prescribed.

These Sections are set out in the Bill of Complaint, not for the purpose of showing that the Court had jurisdiction of the cause or of the parties, but only to show that the Defendant could be found in Mississippi and process there served upon it, and that no order prescribing the method of service of process, was therefore necessary under Section 57 of the Judicial Code of the United States.

We will hereafter discuss the grounds upon which it is sought to have the several judgments cancelled and entries thereunder enjoined. The Defendant, however, contends that if the judgments are void upon the grounds presented by the Bill of Complaint, they are void upon their faces, and that a Court of Equity will not take jurisdiction to cancel an instrument that is void on its face. If this position was well taken, it would render a consideration of several of Complainant's contentions unecessary, and for that reason it will be first discussed, although the invalidity of the judgments upon one of the grounds urged in the bill of complaint does not appear upon the face of the proceedings.

UNDER THE MISSISSIPPI STATUTES A VOID INSTRUMENT WILL BE CANCELLED AS A CLOUD.

The general, but not the universal, rule is that equity will not entertain jurisdiction to cancel as a cloud upon title an instrument that is void upon its face. In some states the rule is qualified so as not to apply to cases where it requires legal

learning and acumen to determine whether the instrument is upon its face valid or void.

Merchant's Bank vs. Evans, 51 Mo., 335.
Polliham vs. Reveley, 81 Sou. West., 182.
Mining Co. vs. Coyne, 147 Sou. West., 148.
Perkins vs. Baer, 68 Sou. West., 939.
Verdin vs. St. Louis, 33 Sou. West., 480.

In other jurisdictions the rule is repudiated in its entirety.

Schofield vs. City of Lansing, 17 Mich., 437.
Day Land Co. vs. State, 4 Sou. West., 865.
3 Pomeroy's Equity Jurisprudence, Section 1,399.

Upon this last proposition, authorities might be multiplied, but the proposition itself is not deemed material to this discussion.

In other states the rule is changed by statute. This is the case in New Jersey and Mississippi.

In New Jersey, the statute reads as follows:—

> "When any person is in peaceable possession of lands in this state, claiming to own the same, and his title thereto, or to any part thereof, is denied or disputed, or any person claims or is claimed to own the same, or any part thereof, or any interest therein, or to hold any lien or encumbrance thereon, and no suit shall be pending to enforce or test the validity of such title, claim or encumbrance, it shall be lawful for such person so in possession to bring and maintain a suit in chancery to settle the title to said lands, and to clear up all doubts and disputes concerning the same.

Section 550 of the Code of Mississippi, of 1906, relates to the same subject matter, and reads as follows:—

> "When a person, not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right or title thereto, which may cast doubt or suspicion on the title of the real owner such

> real owner may file a bill in the Chancery Court to have such conveyance or other evidence or claim of title canceled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not; and any person having the equitable title to land may, in like cases, file a bill to divest the legal title out of the person in whom the same may be vested, and to vest the same in the equitable owner."

In the case of Bogert vs. City of Elizabeth, 27 New Jersey, Equity, page 568, the owner of a lot of land filed a bill to cancel a conveyance of his property made under a sale for the payment of a paving assessment, upon the ground that the proceedings under which the sale was made were illegal and void.

The Court first discussed the proceedings under which the sale was made, and concluded the discussion as follows:—

> "It is consequently clear that the sale of the complainant's land was an empty form, and passed no title to the city."

The Court then discussed the conflict between the Courts as to whether a Court of Equity will cancel an instrument which is void upon its face, for the purpose of removing a cloud upon the title to property, and then says:—

> "In the case now before this Court the illegality of this sale and of all the proceedings leading to it is, at first view, so conspicuous, that if, in this state, the question of the jurisdiction of the Court had to be decided from consideration derived from general principles, it is easy to see that a conclusion could not be reached without difficulty. But this is not the case, for the inquiry is controlled by the act to quiet titles, passed March 2, 1870."

The Court then quotes the act which is set out above and proceeds as follows:—

> "The object of this enactment, I think, is obvious: it was to extend the jurisdiction of the Court of Equity

over the class of cases embracing the present one. Unless this was the design, I am at a loss to assign to it any office, for the jurisdiction of the Court, to the extent of the English and New York rule, could not have been deemed in doubt. The act is plainly remedial, and its language is very comprehensive, and in my judgment it should be construed to give jurisdiction in every case in which any claim or lien upon real estate appears to be asserted, or to exist. It is highly desirable that land should be freed from every lurking and unsubstantial claim, for even the suspicion of such claim, no matter how ill-founded, affects the value of the property when on sale. The policy which the statute is designed to promote is beneficial and enlightened, and it should be received with favor. It provides adequate checks against abuse, for it declares that if the defendant shall suffer a decree *pro confesso* to be taken, such decree shall not carry costs; and if he shall deny that he claims any interest or encumbrance in the premises, he shall be entitled to costs. I can not see why under these safeguards against vexation, an owner of land should not have the privilege, in every imaginable case, of putting to the test, everything which presents a suspicious appearance against his title. The sale in the present case was impressive by being made under a city ordinance, conducted by official authority, and in the course of a procedure presenting to the unprofessional eye, the ordinary marks of legality. Its effect, I cannot doubt, would be to detract, in a considerable degree, from the market value of the land. In my opinion, the statute in question can have no more appropriate use than in its application to this situation."

In the case of Cook v. Friley, 61 Miss., page 1, a bill to remove a cloud was filed, and the Court said:—

"If the complainant is the real owner of the land and the defendant either has any evidence of title thereto, or asserts any claim or pretends to have any right or title thereto, which may cast doubt or suspicion on the title of the real owner, such real owner may

exhibit his bill against such person to have such evidence of title canceled or the cloud, doubt or suspicion removed from the title.

"The statute 1833, of the Code of 1880, not only authorizes the real owner to file his bill to cancel a paper title, but also to remove the cloud, doubt or suspicion which may spring from the assertion of claim or pretense of right or title thereto by the defendant, who without any muniment of title may assert a claim or pretend to have right or title. The purpose was to give the real owner a remedy against one who asserts any claim or pretends to have any right or title to such owner's land, in analogy to the right of action by the canon law for jactitation of marriage. The real owner is entitled to protection against jactitation of title to the disparagement of his real ownership. He may bring into court one who asserts any claim or pretends to have any right or title to his land, and require him to vindicate his claim or submit to its extinguishment by decree of the Court. The defendant in such case must maintain his claim or right, or it will be disposed of by decree against him. If he disclaims all right or title, it is a mere question of costs. If he asserts a claim or right as to the land, its validity will be passed on by the Court. All that the complainant need aver is that he is the real owner, and that the defendant is not, but asserts claim or pretends to some right to his land so as to cast doubt or suspicion on his title, which he seeks to have disposed of as a cloud on his title—clearing it by decree of the Court."

In the case of the Peoples Bank of New Orleans vs. West, 67 Miss., 729; 7 Sou. Rep., 516, an attachment was levied and the property sold thereunder, and the deed made to the purchaser was attacked by a bill in equity upon the ground that the attachment proceedings were void, and the deed made thereunder, a cloud upon the owner's title.

The Court discussed the validity of the attachment proceedings and reaches the conclusion that they were void and then concludes as follows:—

> "When the complainant shows a perfect title, legal or equitable, and the title of the defendant is shown to be invalid, it is, in the nature of things, a cloud upon the title of complainant and should be cancelled."

In the case of Drysdale vs. Biloxi Canning Factory, 67 Miss., 534; 7 Sou. Rep., 541, the property had, as in the last case, been levied on under attachments and sold, and the bill was filed to cancel the deed thereto as a cloud upon the title to the property.

The Court discusses the irregularity of the attachment proceedings, and holds that they were void and the deed a cloud upon the title, as follows:—

> "The flagrant disregard of these plain statutory requirements, designed to give a non-resident defendant notice of the pendency of an attachment suit against him, must be held to vitiate and nullify all subsequent proceedings in the causes. Without any former adjudications on this point (and there are several in our reports) it seems incredible, almost, that any sane suitor should begin proceedings under our attachment laws, and hope to win in a legal contest, in despite of his gross neglect of the simplest and plainest provisions of the statutes on the subject of attachments. From the record, as it appears here, the appellant was entitled to have the relief prayed in his bill."

See also:—

Hurley vs. Board of Miss. Levee Commission, 76 Miss., 141; 23 Sou., 580.

Gambrill Lumber Co. vs. Saratoga Lumber Co., 87 Miss., 773; 40 Sou., 485.

Vinegar Bend Lumber Co. vs. Oak Grove & Georgetown R. R. Co., 89 Miss., 84; 43 Sou., 299.

It follows that under the influence of the Mississippi statute an instrument void upon its face, or a mere claim that could not be enforced in any court may be annulled and cancelled as a cloud upon the owner's title; and when under the statute

of a state a property owner has the right to resort to a state court of equity to cancel an instrument which is void upon its face, he also has the right to resort to a Federal Court of Equity for the same purpose if the other jurisdictional elements are present.

In the case of Reynolds vs. Crawfordsville Bank, 112 U. S., 405, a bill was filed to cancel a certain deed as a cloud upon the complainant's title and it was found by the Court, among other things, that the deed was "wholly inoperative, null and void," and a cancellation of it as a cloud upon complainant's title was decreed. An appeal was taken from this decree and the Supreme Court of the United States, on page 409, *et seq.*, said:—

> "The appellant next complains of the decree rendered by the Circuit Court, and his first objection is, that the Court had no jurisdiction to quiet the title of the appellee as against a deed averred by the bill and not denied by the answer to be void on its face. The contention is that a deed, void on its face, is not a cloud upon the title, and a claim of title under it is no ground for the interference of a court of equity. This objection is not tenable. It may be conceded that the Legislature of a State cannot directly enlarge the equitable jurisdiction of the Circuit Courts of the United States. Nevertheless an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the States. Broderick's Will, 21 Wall, 503, 520. And, although a State law cannot give jurisdiction to any Federal Court, yet it may give a substantial right of such a character, that when there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal, whether it be a court of equity, admiralty, or common law. *Ex parte* McNeil, 13 Wall., 236, 243.
>
> While, therefore, the courts of equity may have generally adopted the rule that a deed, void upon its face, does not cast a cloud upon the title which a court of equity would undertake to remove, we may yet look to the legislation of the State in which the Court sits to ascertain what constitutes a cloud upon the title, and what the State laws declare to be such the Courts of the

United States sitting in equity have jurisdiction to remove this was expressly held in the case of Clark vs. Smith, 13 Pet., 195, 203, where it was said by this Court: 'Kentucky has the undoubted power to regulate and protect individual rights to her soil and to declare what shall form a cloud on titles; and having so declared, the Courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the Legislature.'

"The State of Indiana, where the present case arose, has declared by statute what kind of a claim against real estate is such a cloud upon the title as will support a suit to remove it. 1070 Rev. Stat. of Indiana, 1881, provides as follows: 'An action may be brought by any person, either in or out of possession, or by any one having an interest in remainder or reversion, against another who claims title to or interest in real property adverse to him, although the defendant may not be in possession thereof, for the purpose of determining and quieting the question of title.'

"This act confers upon any one, against whom another, whether in or out of possession, claims an adverse title or interest in real estate, the substantial right of having the disputed title settled by action of the Courts.

"Under this statute it has been decided by the Supreme Court of Indiana that it is sufficient to aver that the defendant claims some interest or title, or pretended interest or title, adverse to complainant, without stating what the title is. Marot vs. The Germania Building Association, 54 Ind., 37; Jeffersonville &c. Co., vs. Oyler, 60 Ind., 383.

"The bill of complaint in this case complies with this rule by averring that 'said Reynolds is, under his deed' (from Baird, the assignee), 'claiming and asserting title paramount to the title of this complainant;' and the answer to the defendant admits that, under the deed executed to him by Baird, he is claiming whatever title to said lands the same confers on him.

"The question whether, under such a statute as that of Indiana and under the facts stated, the Circuit Court had jurisdiction to render the decree complained

of, has been, in effect, decided in the affirmative by this Court in the case of Holland vs. Challen, 110 U. S., 15.

"In that case, a statute of Nebraska was under review, which provided that 'an action may be brought and prosecuted to final decree by any person, whether in actual possession or not, claiming title to real estate against any person who claims an adverse interest therein, for the purpose of determining such interest and quieting the title.' The Court, speaking by Mr. Justice Field, declared in substance that this statute dispensed with the general rule of courts of equity, that, in order to maintain a bill to quiet title, it was necessary that the party should be in possession, and, in most cases, that his title should be established at law or founded on undisputed evidence or long continued possession.

"If the equity courts of the United States in Nebraska could dispense with these well-established rules of equity, and administer the rights conferred by this statute, it is not open to question that, in this case, the Circuit Court could disregard a similar rule, and entertain jurisdiction of the appellee's case, and accord to him the rights conferred by the statute law, even though the deed under which the appellant claimed was void on its face.

"As the same statute authorizes the Court to take cognizance of the case even when the title of defendant amounts to more than a mere cloud, and applies in every case when the defendant claims an adverse interest in or title to the property in controversy, it is clear that the assignment of error under consideration has no support."

In the case of Cowley vs. Northern Pacific Railroad Company, 159 U. S., 583, the Court says:—

"Although the statute of a State or territory may not restrict or limit the equitable jurisdiction of the Federal Courts, and may not directly enlarge such jurisdiction, it may establish new rights or privileges which the Federal Courts may enforce on their equity

or admiralty side, precisely as they may enforce a new right of action given by statute upon their common law side. Thus in *ex parte* McNeil, 13 Wall., 236, a statute of the State of New York giving to the pilot, who first tendered his services to a vessel, and was refused, a right to half pilotage, was held to be enforceable upon the admiralty side of the District Court. See also the cases of Broderick's Will, 21 Wall., 503, 520, and Clark vs. Smith, 13 Pet., 195, 203. So in Reynolds vs. Crawfordsville Bank, 112 U. S., 405, a bill in equity under a statute of Indiana, which averred that a deed was void upon its face, was held sufficient to support the jurisdiction of the Circuit Court of the United States in that district, to quiet the title of the complainant as against such deed, although courts of equity had generally adopted the rule that a deed void upon its face does not cast a cloud upon the title, which a court of equity will undertake to remove. It was also said in Davis vs. Gray, 16 Wall., 203, 231, that ' a party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality. The wise policy of the Constitution gives him a choice of tribunal.' Other cases to the same effect are Holland vs. Challen, 110 U. S., 15; Marshall vs. Holmes, 141 U. S., 589; Johnson vs. Waters, 111 U. S., 640; Arrowsmith vs. Gleason, 129 U. S., 86."

To the same effect, see:—

Devine v. Los Angeles, 202 U. S., 333.
Chapman vs. Brewer, 114 U. S., 158.
More vs. Steinbach, 127 U. S., 70.

It is submitted, therefore, that even if the District Court could, under a demurrer to the jurisdiction, have considered the question as to whether or not the bill contained equity, still the decree dismissing the bill for want of jurisdiction would have been erroneous as the bill contained equity to remove the cloud from Complainant's right of way in each of the counties.

THE COURT COULD NOT DECLINE TO TAKE JURISDICTION BECAUSE THERE WAS NO EQUITY IN THE BILL OF COMPLAINT TO REMOVE CLOUDS.

The fourth ground of demurrer is "For other reasons apparent." Under this ground of demurrer it was urged that the bill of complaint shows that the several judgments complained of are void upon the faces of the proceedings in which they were rendered, and do not, therefore, constitute clouds upon complainant's title to its rights of way; that void judgments do not constitute clouds upon title to property.

Also that the judgments and the taking thereunder would not injure complainant.

In the case of Ladew vs. Tennessee Copper Co., 218 U. S., 357, 361, a bill was filed seeking to enjoin the defendants from operating furnaces, smelters and ovens in proximity to complainant's timber lands, upon the ground that the fumes from defendant's plant would destroy the timber upon complainant's property, and the contention was that the right to have defendant so use its property as not to injure complainant's property constituted a claim to that property within the meaning of the 57th section of the Judicial Code of the United States.

The Court, speaking through Mr. Justice Harlan, refused to sustain the contention and held the suit to be a mere personal action to abate a nuisance. In that case Complainant made no claim of any kind to Defendant's property, nor did Defendant make any claim to Complainant's property. No instrument existed which purported to create any claim or right to the property of either party, and no claim was made thereto.

In the case of the Citizens Savings & Trust Co. vs. Illinois Central Railroad Co., 205 U. S., 46, the bill was filed by an Ohio corporation as a stockholder in "The Bienville Company," et al., to set aside certain leases and conveyances of the "Bienville Company," and for an accounting, and it was held that if the property purporting to have been conveyed or leased was in the district where the suit was brought, then the suit was properly brought and the Court had jurisdiction. The Court declined to consider whether the allegations of the bill entitled the Complainant to relief or not. Upon this subject the Court, on page 58, said:—

> "We express no opinion upon the question whether, upon its showing, or in the event the allegations of the bill are sustained by proof, the plaintiff is entitled to a decree giving the relief asked by it. There was no demurrer to the bill as being insufficient in equity. The only inquiry now is whether, looking at the allegations of the bill, the suit is of such a nature as to bring it within the act of 1875, as one to remove incumbrances or clouds upon real or personal property within the district where the suit was brought, and, therefore, one local to such district."

In the case at bar, it is clearly shown that Complainant owns the rights of way, subject to such interest therein, if any, as were created by the judgments complained of; that the Defendant claims a right to the possession and use of parts of Complainant's rights of way under and by virtue of such judgments. The bill seeks to cancel these judgments as incumbrances and clouds upon Complainant's title and to enforce and protect its claim to the exclusive use of its entire rights of way.

Defendant's contention is that under the allegations of the bill, the judgments under which Defendant claims a right to the possession and use of parts of Complainant's rights of way, are void upon the faces of the proceedings under which they were rendered and that the judgments do not, therefore, constitute clouds upon Complainant's title. We have discussed this question fully, but even if it justified the dismissal of the bill for want of equity, it would not deprive the District Court of jurisdiction.

When the bill was filed and the jurisdiction of the Court questioned, upon the ground that the bill was not a bill to enforce a claim or remove a cloud from property, the Court was confined to this inquiry—What is the purpose of the bill? It could not inquire whether the allegations of the bill entitled Complainant to the relief sought.

If, upon an examination of the bill, the Court found that it was not the purpose of the bill to enforce a claim or remove an incumbrance or cloud, the Court should have declined to take jurisdiction as the Court did in the case of Ladew vs. Tennessee Copper Company. If, on the contrary, such appeared to be *the purpose* for which the bill was filed, the Court was obliged

to take jurisdiction of the cause before it could determine whether the allegations of the bill were sufficient to entitle the Complainant to relief, and had the demurrer attacked the bill upon the ground that it contained no equity to cancel the judgments complained of, as clouds upon Complainant's title, because the allegations of the bill showed that such judgments were void upon their faces, the Defendant would have thereby waived the want of jurisdiction in the Court based upou venue.

Western Loan & Savings Co. vs. Butte & Boston Consolidated Mining Co., 210 U. S., 368.
Texas Co. vs. Central Fuel Oil Co., 194 Fed. Rep.,1, 9.

If, then, the demurrer presented the question of want of equity in the bill, to cancel the judgments as clouds upon the title, the question of venue was waived; if, on the other hand, the demurrer did not raise that question, then that question was not before the Court.

DEFENDANT CLAIMS THAT THERE WAS NO JURISDICTION TO CANCEL AN INCUMBRANCE OR CLOUD BECAUSE NO DAMAGE IS SHOWN.

Each application by which the proceedings complained of were commenced, contained substantially the following language:—

> "And your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross-arms and wires, it should become necessary for the said defendant to change the location of its track, or construct new tracks or side tracks, where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be set, cross-arms placed and wires strung, that petitioner will, at its own expense, upon reasonable notice from said defendant, remove said poles, cross-arms and wires to such other point or points on said defendant's right of way as shall be designated by said defendant."

The defendant contends that under this stipulation there can be no damage to the railroad by the use of its right of way for telegraph purposes, and in support of this proposition, they rely upon the case of the Mobile & Ohio Railroad Co. vs. the Postal Telegraph Company, 76 Miss., 731, 26 Sou., 370.

It is true that in that case Mr. Justice Whitfield expressed the opinion that a railroad could only sustain nominal damages by the use of its right of way by a telegraph company, but whether a railroad does or does not sustain damages by the taking of its property is a question of fact, depending upon the circumstances of each case and one that is, by statute, submitted to the determination of an eminent domain court. If the right to condemn existed and the eminent domain courts in which the judgments complained of were rendered were lawfully organized, then the verdicts rendered by those courts as to the amounts of damages that Complainant will sustain by the use of its property for the purpose declared in its original application is *res adjudicata* between the parties.

> Vinegar Bend Lumber Co. vs. Georgetown & Oak Grove R. R. Co., 89 Miss., 84; 43 Sou., 295.

If, on the other hand, defendant had no right to condemn or if the tribunals were not lawfully organized, then, the question has not been adjudicated, and under the laws of Mississippi, no tribunal other than a court of eminent domain can determine it.

> M. J. & K. C. R. R. Co. vs. Hoye, 87 Miss., 571; 40 Sou., 5.

Even if the question of damages was one within the jurisdiction of a chancery court, it could not be said that the railroad company would sustain no damage by the use of its right of way on account of the stipulation contained in the application.

A railroad company has the right to operate a telegraph line as appurtenant to its railroad.

> Mobile & Ohio R. R. Co. vs. Postal Tel. Co., 76 Miss., 731; 26 Sou., 370.

The third paragraph of the bill of complaint shows that the Western Union Telegraph Company has heretofore occupied the right of way of the railroad company under a contract,

and that the contract has ceased to exist. The court judicially knows that a railroad company cannot be successfully operated without the use of a telegraph line, and as the bill shows that the contract between the telegraph company and the railroad company has been terminated, it necessarily follows that the railroad company must have for the operation of its trains, a telegraph line.

Now, the stipulation contained in the application is that the telegraph company will remove its poles and wires when it becomes necessary for the railroad company to change the location of its tracks or to construct new tracks, or side tracks where the same do not now exist, but there is no stipulation that they will remove them if the right of way becomes necessary for the use of a telegraph line by the railroad company. Besides this, the judgment of condemnation in each case, authorizes the telegraph company to attach its poles, cross-arms and wires to such portion of the bridges of the railroad company as is within the county as to which the condemnation applies. There can be no presumption that this will create no damage.

Besides, under Section 550 of the Code of Mississippi hereinabove set out, the right to cancel the instrument or claim is given, without regard to the damage resulting therefrom.

In Hurley against Board of Mississippi Levee Commission, 76 Miss., 141, 23 Sou., 580, the Court, qouting from "Beach Modern Equity Jurisprudence," said:—

> "Where the power of Eminent Domain has been delegated to public officers or others, who are threatening to make a permanent appropriation of private property to public uses, in excess of the power granted, or without complying with the conditions upon which the right to make the appropriation is given, a court of equity will prevent the threatened wrong without regard to the question of irreparable damages or the existence of legal remedies which may afford a monied compensation."

See also:—

Canadian Pacific v. Moosehead Telg. Co., 76 Atl. Rep., 885.
Hyde v. Minn. D. & P. Ry. Co., 123 N. W., 849.
Spurlock v. Dornan, 81 S. W., 412.

FOR THE PURPOSE OF FEDERAL JURISDICTION THE ALLEGATIONS OF THE BILL AS TO THE VALUE OF THE PROPERTY INVOLVED MUST BE ACCEPTED.

Smithers v. Smith, 204 U. S., 642.

While it is not believed to be material to the errors assigned we submit that the bill contains equity upon several different grounds.

THE EMINENT DOMAIN PROCEEDINGS WERE FOR THE MAINTENANCE OF AN EXISTING TELEGRAPH LINE, AND THERE IS NO POWER OF EMINENT DOMAIN FOR THAT PURPOSE.

The only rights of eminent domain conferred upon telegraph companies to condemn to their use, rights of way of railroads in the State of Mississippi, are those granted by Section 929 of the Code of Mississippi.

In the case of the Cumberland Tel. & Tel. Co. v. Yazoo & M. V. R. R. Co., 90 Miss., 686 (44 Southern Reporter, 166), the Court said:—

> "In the whole chapter on corporations, the grant of eminent domain powers is found in but one section, and this is in Section 929 above referred to, and is conferred upon telegraph and telephone companies, whether foreign or domestic, and for the purpose of constructing new lines; and the only other corporation which is given this power in the chapter on corporations is an interurban street railway, and as with telephone companies, it is given only for the purpose of constructing now lines."

Each of defendant's applications for eminent domain proceedings described the particular property sought to be condemned. (Record, page 21.) The property so described are parts of complainant's right of way, one hundred feet in width, lying in the State of Mississippi, between the Alabama and the Louisiana line. Each application alleges that the

defendant desired to erect and maintain thereon its telegraph poles, cross-arms and wires "the said line of poles, cross-arms and wires to be constructed and for which this condemnation is sought being a new line."

A new line, within the meaning of Section 929 of the Code of Mississippi, is defined by the Supreme Court of that State in the case of Cumberland Tel. & Tel. Co. v. Yazoo & M. V. R. R. Co., 90 Miss., 686 (44 Southern Reporter, 166), as follows:—

> "A new line is constructed within the meaning of the statute, whenever the telephone company changes its route and runs its line in a different route from that already occupied by it, involving the necessity of taking and occupying land not heretofore occupied by them."

It follows that, if the property described in the application and sought to be condemned for the use of the defendant, was, at the time the proceedings were begun, already occupied by a telegraph line belonging to the defendant, then the defendant had no power to condemn the property.

The bill of complaint alleges that the property was so occupied. These allegations are made in the fourth, fifth (Record, pages 2 and 3), and eleventh (Record, page 12) paragraphs of the bill of complaint, and are as follows:—

> "The defendant, the Western Union Telegraph Company, owns, maintains and operates, and for many years has owned, maintained and operated, a line of telegraph poles, and wires along and upon the said right of way, from the dividing line between the State of Alabama and the State of Mississippi to the dividing line between the State of Mississippi and the State of Louisiana. Said telegraph line is and has for many years, been located, maintained and operated upon complainant's right of way, and upon or attached to its said bridges, under a contract between the complainant and the defendant, the Western Union Telegraph Company, and not otherwise, and by one of its provisions said contract may be terminated by either of the parties thereto at the expiration of one year, after written notice shall have been given by one of the parties thereto to the other of said parties, of a desire

or intention to terminate the same. Said contract will terminate on August 17th, 1912, pursuant to a notice that has been given thereof by the defendant, as provided by the terms of said contract." (Paragraph four, Record, page 2.)

"Under an alleged power of eminent domain, which it claims is vested in it by the laws of the State of Mississippi, the defendant, the Western Union Telegraph Company, attempted to obtain by the proceedings herein alleged and complained of, the right to continue the use of complainant's said right of way for the maintenance and operation of said Western Union Telegraph Company's said existing line of poles and wires thereon, without any intention to construct any new telegraph line, and to this end, the said defendant, the Western Union Telegraph Company presented three separate applications for the condemnation and use of the defendant, the Western Union Telegraph Company, of part of complainant's said right of way and bridges lying in said respective counties, as hereinafter alleged." (Paragraph five, Record, page 3.)

"Complainant further shows to your Honor that, although it is alleged in the several petitions of the Western Union Telegraph Company that the telegraph line for which it desired to condemn a right of way was to be a new line, in fact and in truth, said Western Union Telegraph Company did not desire said right of way for the purpose of erecting any new telegraph line, nor did it intend to use the same for that purpose. It desired and intended to obtain said right of way for the purpose of maintaining its said existing telegraph line thereon. This was shown by the testimony introduced by the defendant, the Western Union Telegraph Company in each of said condemnation proceedings, and the said Western Union Telegraph Company had no right to condemn the property of the defendant for said purpose." (Paragraph eleven, Record, page 12.)

It follows that if the allegations of the bill of complaint be taken as true for the purpose of the demurrer, then defendant had no right of eminent domain for the purposes for which its

proceedings were instituted, and said several judgments are void.

The defendant contends that when the proceedings of an eminent domain court are attacked as void, the court must look to the allegations of the application, and that these allegations are conclusive. In other words, the contention is that the application states that the proposed lines are new lines (which the Supreme Court of Mississippi says means that defendant has not already a telegraph line located upon the same property) and that complainant will not be allowed to show by the bill that the property was in fact already occupied by an existing line belonging to the defendant.

Under the laws of Mississippi, Defendant had no right to condemn the property if it already had an existing telegraph line upon it.

> Cumberland Tel. & Tel. Co. v. Yazoo & M. V. R. R. Co., 90 Miss., 686 (44 Southern Reporter, 166.)

But it could not set up this want of power, either in the eminent domain proceedings, or upon an appeal therefrom, or in any other way than in a court of equity.

> Vinegar Bend Lumber Co. v. Oak Grove and Georgetown R. R. Co., 89 Miss., 84 (43 Southern Reporter, 296.)

If defendant's position is maintainable, property can, by a mere false allegation in the application for eminent domain proceedings, be taken by one not having a right thereto, without the owner having an opportunity to be heard in any tribunal. In short, without due process of law.

In the case last cited, the applications for eminent domain proceedings were alleged to be for a public use, and the court expressly held that the proceedings were void if the use for which the property was condemned was not one in aid of which rights of eminent domain were conferred, and that the proper and only method of challenging this right was by a bill in equity to have the judgment declared void, and to enjoin an entry thereunder.

The judgments in this case are also attacked because the orders appointing justices of the peace for the purpose of organizing the eminent domain court were not made by endorsements upon the applications, but by orders made upon separate papers.

IS THE REQUIREMENT OF THE STATUTE THAT THE ORDER BE ENDORSED UPON THE APPLICATION MANDATORY?

Under the laws of Mississippi, the justice of the peace in an eminent domain proceeding acts ministerially, and the whole proceedings are special and statutory.

> Sullivan v. Yazoo & M. V. R. R. Co., 85 Miss., 649 (38 Southern Reporter, 33.)

In such proceedings, all of the material requirements of the statute *must be literally complied with*, and such compliance must *appear upon the face of the record.*

> White vs. Memphis B. & A. R. R. Co., 64 Miss., 566. (1 Southern Reporter, 730.)
> Madden v. Louisville, N. O. & T. R. R. Co., 66 Miss., 258 (6 Southern, 181.)
> 15 Cyclopedia of Law & Procedure, 812.
> Lewis on Eminent Domain, Sections 403, 406.

In the case of White vs. Memphis, B. & A. R. R. Co., 1 Southern, 730, the proceedings were under a charter, but were similar to the proceedings described by Chapter 43 of the Code of Mississippi, and speaking of such proceedings the Court says:—

> "The remedy is summary, in derogation of the common law, and is wholly governed by the statute. In such cases the material requisites of the statute must be complied with, and compliance must appear on the face of the record."

Section 1,856 of the Code of Mississippi requires the petition or application for condemnation to be presented *to the clerk of the court*, and requires *him to endorse thereon* the appointment

of *a competent justice of the peace* to constitute, with a jury, a special court of eminent domain, and to fix a time and place in the county for the organization thereof.

The bill of complaint shows that in neither instance was there any appointment of a justice of the peace *by endorsement upon the application*, and as the statute does not authorize any other method of appointment, nor the evidencing thereof in any other way, a proceeding which does not show upon its face such an appointment *by such an endorsement upon the application* fails to show *on the face of the record*, compliance with the material requisites of the statute.

The contention of the defendant is that the statute should be liberally construed, and that the endorsement of the order upon the application is not mandatory; that the making of an order upon a separate piece of paper is a substantial compliance with the statute.

The contention that the statute must be liberally construed is in conflict with the authorities cited above, and an examination of the eminent domain proceedings will show that in the State of Mississippi, nothing is left to the discretion of the officers instituting or conducting the proceeding. Every step of the proceeding is laid down in exact form. The exact form of the verdict of the jury, and the exact form of the judgment entry are both prescribed.

In two of the instances complained of proceedings were commenced by the presentation of applications *to deputy clerks* of the circuit court, and the eminent domain courts were organized by justices of the peace *appointed by such deputies*. Complainant contends that *deputy clerks were without authority to make the order under which the eminent domain courts were organized*, and that the proceedings were, therefore, void.

DEPUTY CLERKS OF THE CIRCUIT COURT ARE WITHOUT AUTHORITY TO MAKE ORDERS IN EMINENT DOMAIN PROCEEDINGS.

Section 1,856 of the Code of Mississippi requires the petition or application for condemnation to be presented *to the clerk of the court*, and requires him to endorse thereon the appointment of *a competent justice of the peace* to constitute, with a jury, a special court of eminent domain, and to fix a time and place in the county for the organization thereof.

The act of the clerk, in appointing a justice of the peace, as a constituent part of an eminent domain court, is necessarily judicial in its nature. He is required to make the appointment of *a competent justice*, and must necessarily determine whether the justice *is or is not competent*. He is required to make the appointment if the allegations of the application show that the applicant has the right to condemn, and he should not do so if the application fails to show that the applicant had the right to condemn. This results from the fact that unless the application shows the right to condemn, the clerk has no power to appoint a justice of the peace, or to make any other order; and any proceedings under such an application is a nullity.

> Cumberland Tel. & Tel. Co. v. Yazoo & M. V. R. R. Co., 90 Miss., 684 (44 Southern Reporter 166.)

A deputy cannot perform a duty imposed upon his principal which involves the exercise of discretion and judgment, unless expressly authorized to do so by some law.

> 23 Am. & Eng. Encyc. Law, 365 and 266.
> 1st Am. & Eng. Encyc. Law, 975.
> 11 CYC., 397.
> 29 CYC., 1,433.
> Mechem on Public Officers, 567.

In the case of the Pennsylvania Railroad Company vs. Heister, 8 Penn. St., 445, 452, a statute provided that in inquisition proceedings to determine the value of land taken by a railroad, the court of sessions should, on application of the owners "issue a precept to the sheriff, commanding him to summons twenty disinterested free-holders" to ascertain what damages had been sustained, and that twelve of the jurors should be impannelled and sworn by the sheriff or his deputy to estimate the value of the land. The sheriff, instead of summonsing the jury from the county at large, summonsed them from a list prepared by his deputy. The Court said:—

> "In the two cases of McClure v. Doctor Riley, exception is taken to the manner of selecting and summonsing the jurors.. Although I am perfectly

satisfied of the integrity of the transaction, yet I am convinced that the sheriff has proceeded in a mistaken view of his public duties. The sheriff is commanded to summons twenty discreet and disinterested free-holders from the body of the county, and not from a list prepared by another, although that other may be the deputy sheriff."

In McMaster v. Carothers, 1st Penn. State, 224, it is said:—

> "It is error for the constable, without other warrant than a verbal direction from the deputy sheriff, to select and summons the inquest. The selection of a jury implies judgment and discretion, and partakes so much of a judicial character that it cannot be delegated by a person who is himself but a deputy. The officer who selects a jury performs an important duty to the parties, essential to the administration of justice under the solemn sanction of his oath of office. It is obligatory to be performed by himself, and not by another, and a subsequent ratification of the act improperly committed to another, instead of validating it, would itself be questionable."

In Sumner v. Roberts, 13 N. C., 527, it was held that a deputy clerk could not certify the probate of a will, the act being considered judicial in its nature.

In Carlisle v. Carlisle, 2 Harrington, 318 (Delaware) the Court said:—

> "Wherever the legislature has, by statute, conferred upon a ministerial officer, such as the prothonotary, a power requiring the exercise of judgment and sound discretion for the protection of interests which are manifestly from the face of the statute the subject of legislative solicitude, he cannot delegate the trust to another, but must faithfully discharge it himself. If he delegates the power to another to be exercised in his absence, the interest intended to be protected by the act cannot be affected by the exercise of such power."

Section 1,006 of the Code of Mississippi (which is part of Chapter 27) provides for the appointment of a deputy clerk as follows:—

> "The clerk of the Supreme Court, of the Crcuit Court and of the Chancery Court shall have power, with the approbation of the court or of the judges in vacation, to appoint one or more deputies who shall take the oath of office, and who thereupon shall have power to do and perform all the acts and duties which their principals may lawfully do."

The acts which the deputies are authorized by this section to do are acts relating to the performance of the duties of the clerks of the courts *virtuti officio*, and does not include other acts to be done under special authority conferred upon clerks by statute.

Section 1,000 (which is also part of Chapter 27 of the Code) provides as follows:—

> "Each court shall have control over all proceedings in the clerk's office of such court during the preceding vacation, and may correct any errors or mistakes therein, and may set aside any of said proceedings, and may make such orders therein as may be just and proper; and may, for good cause shown, reinstate any case discontinued during said vacation; and shall also have power to arrange the business therein in a convenient manner and to establish, from time to time, rules and orders for the conducting of suits, proceedings and respecting all matters to be done in term time or in vacation, not repugnant to law."

As has been shown by Section 1,856 (which is part of the Eminent Domain Chapter) the clerk is required to fix the time for organizing the court of eminent domain, and if the provisions of Chapter 27 of the Code were applicable to the duties of the clerk performed under the Eminent Domain Chapter, the Judge of the Circuit Court could, under Section 1,000, change the time fixed by the clerk organizing the eminent domain court; or

should the clerk fail to fix such time the Judge of the Court would have the authority to do so, and yet the Supreme Court of Mississippi has clearly held that the Court has no such power.

In Sullivan vs. Y. & M. V. R. R. Co., 85 Miss., 649 (38 Southern, 33), the Supreme Court of Mississippi, reviewing an order of mandamus issued by the Judge of the Circuit Court, wherein it had directed the eminent domain court to proceed upon a day fixed by the judge, said:—

> "The clerk of the circuit court is directed by law to fix the time at which and the place where, the court of eminent domain is to meet, and to summons eighteen men from whom the jury is to be selected. We do not think that the Circuit Judge has power to fix the time or place in his orders, for the reconvening of the eminent domain court, or to direct the justice of the peace to have other competent parties summoned as jurors."

Section 1,006 of the Code of Mississippi only applies to acts of the clerk *virtuti officio*, and not to special authority conferred upon him by statute.

Muller v. Boggs, 25 Cal., 175.
Harrison v. Harwood, 31 Texas, 650.
State v. New Jersey, 25 N. J. Law, 309.

Respectfully submitted,

GREGORY L. SMITH,
HENRY L. STONE,

for Appellant.

STATE OF ALABAMA, County of Mobile.

Personally appeared before me, W. G. Caffey, a Notary Public in and for said State and County, Gregory L. Smith, who being sworn, deposes and says that on the 9th day of February, 1914, he deposited in the United States Postoffice at Mobile, Alabama, postpaid, copies of the brief, to which this affidavit is attached, addressed as follows, viz:

One copy addressed to Mr. Rushton Taggart, at No. 195 Broadway, New York City, New York.

One copy addressed to Mr. Geo. H. Fearons, at No. 195 Broadway, New York City, New York.

One copy to Mr. J. B. Harris, Jackson, Mississippi.

Mr. Rushton Taggart and Mr. Geo. H. Fearons are the attorneys of record for Appellee in said cause.

That the postoffice address of Mr. Rushton Taggart and also Mr. Geo. H. Fearons, is No. 195 Broadway, New York City, New York.

Affiant further deposes and says that the said several briefs, so mailed, should, by due process of mail, have reached each of the said several parties to whom they are addressed, before the time of the filing of this brief.

.....

Subscribed and sworn to before me this 9th day of February, 1914.

.....

Notary Public, Mobile County, Alabama.

We acknowledge service of a copy of said brief this the .....day of February, 1914.

.....

Attorneys for Appellee.

Supreme Court of the United States

OCTOBER TERM 1912

No. 337

LOUISVILLE & NASHVILLE RAILROAD CO.,
Appellant,

vs.

WESTERN UNION TELEGRAPH COMPANY,
Appellee.

BRIEF OF APPELLANT.

J. H. Orman & Son, Printers

SUBJECTS INDEXED.

STATEMENT OF THE CASE, Pages 4 to 12.
Argument, Page 12.

I. **The purpose of the bill of complaint is to enforce a claim and remove a cloud from property situated in the district** where the suit is brought. Pages 12 to 17.

1a. Where there is diversity of citizenship, a bill of complaint to enforce a claim or remove a cloud is properly filed in the district where the property affected lies. Pages 13 to 15.

Greely vs. Lowe, 155 U. S., 58.
Jellinik vs. Huron Copper Mining Co., 177 U. S., 9.
Citizens' Savings & Tr. Co. vs. I. C. R. R. Co., 205 U. S., 46.

1b. Under the laws of Mississippi, there is no method of protecting the rights of a property owner against appropriation under the powers of eminent domain, except by a bill in equity filed after judgment to cancel the judgment as a cloud upon the title to the property. Page 17.

Vinegar Bend Lbr. Co. vs. Oak Grove & Georgetown R. R. Co., 89 Miss., 84; 43 Sou., 298.

II **The Court could not decline to take jurisdiction because there was no equity in the bill.** Page 17.

Citizens' Savings & Tr. Co. vs. I. C. R. R. Co., 205 U. S., 46.

2a. Upon an objection to jurisdiction, the Court's inquiry is confined to the purpose of the bill as distinguished from the sufficiency of its allegations to show equity. Page 19.

2b. An objection to a bill for want of equity where there is diversity of citizenship waives any objection to jurisdiction on account of the venue. Pages 19 and 20.

Western Loan & Savings Co. vs. Butte & Boston Consolidated Mining Co., 210 U. S., 368.
Texas Co. vs. Central Fuel Oil Co., 194 Fed., 9.

III. **The bill of complaint was not without equity.** Pages 20 to 32.

3a. Under the laws of Mississippi, no opportunity to be heard in a condemnation proceedings is afforded the property owner, but he is allowed to set up all defenses in a bill in equity subsequently filed to cancel the judgments and remove them as clouds upon the title to the property condemned. Pages 20, 21.

Vinegar Bend Lbr Co. vs. Oak Grove & Georgetown R. R. Co., 89 Miss., 84; 43 Sou., 296.

3b. This right is the only thing that prevents such proceedings from operating to take the property without due process of law. Page 21.

Freedland vs. Williams, 131 U. S., 405.

3c. It is necessary to due process of law that, at some stage, the complaining party shall have an opportunity to be heard in some regularly established proceedings. Pages

Simon vs. Craft, 182 U. S., 427.
American Land Co. vs. Zeiss, 219 U. S., 47.
Appleby vs. Buffalo, 221 U. S., 532.
Twining vs. New Jersey, 211 U. S., 111.

3d. Under the Mississippi statute a court of equity will cancel an instrument that is void upon its face. Pages 22, 27.

Cook vs. Fryley, 61 Miss. 1.
Drysdale vs. B. & Co., 67 Miss. 534; 7 Sou., 541.
Hurley vs. Board of Miss Levee Com'rs., 76 Miss. 141; 23 Sou., 580.
Gambrill vs. Saratoga L. Co., 87 Miss., 773; 40 Sou., 485.
V. B. L. Co.. vs. G. & O. G. R. R. 89 Miss., 84; 43 Sou., 298.

And a Federal court of equity will grant the same relief. 27 to 30.

Reynolds vs. Cranfordsville Bk., 112 N. S. 405.
Cowley vs. N. P. R. R. Co., 159 N. S. 583.

3f. The taking of appellant's property was not without damage, and if it were that would not deprive the bill of equity. pages 30 to 32.

ALPHABETICAL LIST OF AUTHORITIES.

American Land Co. vs. Zeiss, 219 U. S., 47.
Appleby vs. Buffalo, 221 U. S., 532.
Bogert vs. City of Elizabeth, 27 N. J. E., 568.
Canadian Pacific vs. Moosehead Tel Co., 76 Atl., 885.
Chapman vs. Brewer, 114 U. S., 158.
Citizens' Savings & Trust Co., vs. I. C. R. R. Co., 205 U. S., 46.
Cook vs. Fryley, 61 Miss., 1.
Cowley vs. Northern Pacific R. R. Co., 159 U. S., 583.
Day Land Co. vs. State, 4 S. W., 865.
Dick vs. Foraker, 155 U. S., 404.
Drysdale vs. B. & C. Co., 67 Miss., 534; 7 Sou., 541.
Freedland vs. Williams, 131 U. S., 405.
Gambrill & Co. vs. Saratoga L. Co., 87 Miss., 773; 40 Sou., 485.
Greely vs. Lowe, 155 U. S., 58.
Hurley vs. Board of Miss. Levee Com., 76 Miss., 141; 23 So., 580.
Hyde vs. Minn., D. & C. P. R. Co., 123 N. W., 849.
Jellinik vs. Huron Copper Co., 177 U. S., 9.
Ladew vs. Tenn. Copper Co., 218 U. S., 357.
Merchants' Bank vs. Evans, 51 Mo., 335.
Mining Co. vs. Coyne, 147 S. W., 148.
Moore vs. Steinback, 127 U. S., 70.
People's Bank of N. O. vs. West, 67 Miss., 729; 7 Sou., 516.
Perkins vs. Baer, 68 S. W., 939.
Pollibain vs. Reverly, 81 S. W., 182.
Pomeroy Eq. Jurisprudence, Sec. 1399.
Pullman Palace Cor Co. vs. Lawrence, 74 Miss., 782; 22 Sou., 53, 55.
Reynolds vs. Crawfordsville Bank, 112 U. S., 405.
Scofield vs. City of Lansing, 17 Mich., 437.
Simon vs. Craft, 182 U. S., 427.
Spurlock vs. Dornan, 81 S. W., 412.
Texas Co. vs. Central Fuel Oil Co., 194 Fed., 9.
Twining vs. New Jersey, 211 U. S., 111.
Verdin vs. St. Louis, 33 S. W., 480.
Vinegar Bend Lbr Co., vs. Oak Grove & Georgetown R. R. Co., 89 Miss., 84; 43 Sou., 298.
Western Loan & Savings Co. vs. Butte & Boston Consol. Mining Co., 210 U. S., 368.

Supreme Court of the United States

OCTOBER TERM 1912

No. 769

LOUISVILLE & NASHVILLE RAILROAD CO.,
Appellant,

vs.

WESTERN UNION TELEGRAPH COMPANY,
Appellee.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This appeal is taken from a decree of the United States District Court for the Southern Division of the Southern District of Mississippi, sustaining a demurrer to, and dismissing a bill of complaint in equity, filed by the Appellant, the Louisville & Nashville Railroad Company, against Appellee, the Western Union Telegraph Company. The question raised by the demurrer was want of jurisdiction of the person of the Defendant. Rec. p. 37 (*57.)

The order allowing the appeal contains a certificate that the jurisdiction of the District Court was the only question determined by the decree from which the appeal was prayed, and is the only question presented for the determination of the Supreme Court upon such appeal, and it is the only question presented by the assignment of error. Rec. p. 38 (*59.)

Appellant (Complainant in the bill) is a corporation created by and organized under the laws of Kentucky, while Appellee (the Defendant in the bill) is a corporation created by and organized under the laws of New York. The

purpose of the bill is to enforce a claim by Appellant (Complainant) to the exclusive possession and use of its railroad rights of way in the Counties of Jackson, Harrison and Hancock, in the State of Mississippi, and to cancel, as clouds upon Appellant's title to such rights of way, three judgments obtained by Appellee in eminent domain proceedings purporting to confer upon Appellee the right to take possession of and use parts of Appellant's said rights of way. These rights of way are all situated in the judicial district and division in which the bill of complaint was filed. Rec. p. 1 (*2).

The contentions presented by the demurrers are:

1. That the bill of complaint could only be filed in the district whereof either the Complainant (Appellant), or Defendant (Appellee) was an inhabitant.

2. That Section 919 of the Code of Mississippi of 1906 is relied upon to confer jurisdiction, and that it did not confer jurisdiction upon any federal court.

3. For other reasons apparent. Rec. p. 36 (*54).

The propositions urged in the lower Court under this ground of demurrer were:

1st. That the judgments sought to be canceled are void upon the faces of the several proceedings in which they were rendered, and do not, therefore, constitute clouds upon Complainant's (Appellant's) title to its rights of way.

2nd. That each application for condemnation alleges in substance as follows:

> "Your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross-arms and wires, it should become necessary for the said defendant to **change the location of its tracks or construct new tracks, or side-tracks,** where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be, set, cross-arms placed thereon, and wires strung, your petitioner will, at its own expense, upon reasonable notice from said defendants, remove said poles, cross-arms and wires **to such other point or points on said** defendant's right of way as shall be designated by said defendants." Rec. p. 30 (*45).

That under these allegations the use of Appellant's right of way cannot damage it, and that a muniment of title to the property of another that results in no damage does not constitute an incumbrance or cloud upon the title thereto.

Section 929 of the Code of Mississippi purports to confer upon telegraph companies the right to condemn parts of railroad rights of way for the construction of new telegraph lines. It reads as follows:

> "Telegraph and telephone companies, for the purpose of constructing new lines, are empowered to exercise the right of eminent domain, as provided in the chapter on that subject. And interurban street railways, for the purpose of constructing new lines between cities, towns or villages, may exercise the right of eminent domain as provided in the chapter on that subject, to condemn property between such cities, towns or villages."

The bill alleges that the proceedings were for the purpose of condemning a right of way for the continued maintenance of a line of telegraph, already existing upon such right of way, and that there was no law authorizing condemnation for such a purpose. Paragraph V of the bill of complaint, Rec. p. 3 (*4).

The procedure for such condemnation is prescribed by Chapter 43 of the Code of Mississippi, and Section 1856, which is part of Chapter 43, prescribes that the proceedings shall be commenced by presenting an application for such condemnation to the clerk of the Circuit Court of the county where the property sought to be condemned lies, and requires such clerk to endorse thereon the appointment of some competent justice of the peace to constitute, with a jury, a special court of eminent domain. The clerk is also required to fix a time and place for the organization of such court.

Section 1856 reads as follows:

> "When any person or corporation having the right so to do shall desire to exercise the right of eminent domain, he or it shall make application therefor in writing, and the owners of the property sought to be condemned and mort-

gagees, trustees, or other persons having an interest therein or a lien thereon, shall be made defendants thereto, which shall state with a certainty the right and describe the property sought to be condemned, showing that of each defendant separately. The application shall be presented to the clerk of the Circuit Court of the county, who shall indorse thereon his appointment of a competent justice of the peace of the county in which the property or some part thereof, is situated, to constitute, with a jury, the special court of eminent domain; and he shall fix the time and place in the county for the organization thereof."

The bill further shows that the application to condemn rights of way in Jackson and Harrison Counties were not presented to the clerks of the Circuit Courts of those counties, but to the deputy clerks, and that such deputy clerks—and not the clerks—made orders, appointing justices of the peace and fixing times and places for the organization of the eminent domain courts. Paragraph VII of the bill of complaint Rec. pp. 3 and 4 (*5 and 6).

In Hancock County the application was presented to the clerk of the Circuit Court and he made an order appointing a justice of the peace and fixing the time and place for the organization of the eminent domain court. Par. VII of the bill of complaint, Rec. p. 4 (*7). In each instance the order was made by a separate writing and was not endorsed upon the application. Par. VII of the bill of complain, Rec. pp. 3, 4, 5 (*5, 6, 7).

Subsequent to the making of these orders and before the organization of the eminent domain court under them, the clerks of the Circuit Courts of Jackson and Hancock Counties, each endorsed upon the application for condemnation in his county, a statement that he had previously made an order, appointing a justice and fixing a day for the organization of an eminent domain court and that he then made an endorsement upon the application to further evidence the making of such order. Par. VII of the bill of complaint; Rec. pp. 4 and 5 (*6 and 7). No such endorsement was made by the clerk of the Circuit Court of Jackson County.

The bill charges that the judgments in Jackson and Harrison Counties are void for the further reason that the deputy clerks had no power to appoint justices of the peace or fix the time and place for the organization of courts of eminent domain. Chapter 43 of the Code of Mississippi prescribes the exact form of the organization of the court; the charge to be given the jury; the verdict to be rendered by them; the form of their verdict, and of the judgment to be rendered by them. Par. IX of the bill of complaint; Rec. p. 10 (*15). These provisions are found in Sections 1862, 1865, 1866 and 1867, which are as follows:

"Section 1862. When an issue shall be ready for trial, a jury of twelve men shall be organized. Each party shall be allowed four peremptory challenges, and as many more as he can show cause for; and whatever is cause for challenge in the Circuit Court shall be cause in the special court. The alphabetical list of jurors shall be called in regular order until the jury shall be completed, or until it be exhausted; and if it be exhausted before a jury is obtained, the sheriff shall summon qualified jurors of the county from the bystanders until the jury be complete; but it shall be a cause of challenge to any person offered as a juror that he had, directly or indirectly, contrived to be summoned as such, or had come to any place that he might be so summoned. The jurors drawn who are not empaneled shall not thereby be discharged, if there be other issues to be tried, but shall remain in attendance on the Court. While being impaneled each juror may be sworn truthfully to answer all questions that may be propounded to him. **The justice of the peace shall not for any cause quash the proceedings or dismiss the court of eminent domain, but must proceed with the condemnation. No irregularity in drawing, summoning, or empaneling the jury shall vitiate the verdict or judgment, and no appeal or certiorari shall be allowed until after verdict by the jury.**" Par. XII of the bill of complaint; Rec. p. 14 (*21).

"Section 1865. The justice shall instruct the jury, in writing, in the followig words: 'The defendant is entitled to recover damages in this cause, and it devolves on you honestly and impartially to estimate the sum thereof, according to the evidence adduced on the trial, the weight

and credibility of which you are the sole judges. The defandant is entitled to due compensation, not only for the value of the property to be actually taken as specified in the application, but also for damages, if any, which may result to him as a consequence of the taking; and you are not to deduct therefrom anything on account of the supposed benefits incident to the public use for which the application is made.' The instruction shall be signed by the justice, be filed, and become a part of the record." Par. XII of the bill of complaint; Rec. p. 14 (*21).

"Section 1866. The verdict of the jury shall be in the following form: 'We, the jury, find that the defendant (naming him) will be damaged, by the taking of his property for the public use, in the sum of ------ dollars', and it shall be signed by each of them. In case an informal or unsigned verdict be returned, it may be amended. Upon the rendition of a verdict, the jurors, other than those selected from the bystanders, shall not be discharged if there be other issues to be tried." Par. XII of the bill of complaint; Rec. p. 14 (*21).

"Section 1867. Upon the return of the verdict, the Court shall enter a judgment as follows, viz:

"In this case the claim of (naming him or them) to have condemned certain lands named in the application, to wit: (here describe property), being the property of (here name the owner) was submitted to a jury composed or (here insert their names) on the ------ day of ------, A. D. ------, and the jury returned a verdict fixing said defendant's due compensation and damages at ------ dollars, and the verdict was received and entered. Now, upon payment of the said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application. Let the applicant pay the costs for which execution may issue.' ------, J. P." Par. XII of the bill of complaint; Rec. p. 15 (*22).

Section 1871 of the Code of Mississippi authorizes an appeal to the Circuit Court. Under the laws of Mississippi, as construed by the Supreme Court of that State, the persons whose property is sought to be condemned has no right to be heard either in the eminent domain proceedings or upon an appeal therefrom upon any defense he may have to the proceedings. The sole question that can be determined in such

proceedings being the value of the property taken. If the property owner desires to defend against the taking of his property, he must do so by a bill in equity to cancel the judgment after it has been rendered. Par. XII of the bill of complaint; Rec. p. 15 (*22).

> Vinegar Bend Lumber Co. vs. Oak Grove & Georgetown R. R. Co., 89 Miss., 117; 43 Sou. Rep., 292.

Under this law, as so construed, Appellant (Complainant) further sought by its bill to cancel the several judgments complained of.

Under Sections 5263-5269, of the United States Compiled Statutes of 1901, Congress has prescribed the terms upon which telegraph companies may occupy the rights of way of post roads, and the bill of complaint alleges that Appellant's (Complainant's) railroad in the Counties of Jackson, Harrison and Hancock, in the State of Mississippi is a post road, and that the several states are excluded from granting to telegraph companies, rights of way over them—upon conditions other than those prescribed by Congress. The bill further seeks to cancel the judgments upon this ground. Par. XVI of the bill of complaint; Rec. p. 18 (*27).

Section 1868 of the Code of Mississippi of 1906 is part of the chapter of laws under which these proceedings were conducted and provides in part as follows:

> "Upon the return of the verdict, and entry of the judgment, if the applicant pay the defendant whose compensation is fixed by it, or tender to him the amount so found and pay the costs, he or it shall have the right to enter in and upon and take possession of the property of such defendant, so condemned and appropriate the same to the public use defined in the application."

Pursuant to this provision and to the forms of such judgment prescribed by the laws of Mississippi, each of the judgments attacked by the bill of complaint contain the following provisions:

"Now, then, upon payment of said award, applicant can enter in and upon said property and devote it to public use as prayed for in the application." Par. VIII of the bill of complaint; Rec. pp. 7 (*10), 8 (*12), 10 (*15).

The Appellee, the Western Union Telegraph Company, after it had obtained its judgments of condemnation, tendered to Appellant, the Louisville & Nashville Railroad Company, the amount of the award fixed by such judgment. Par. VIII of the bill of complaint; Rec. pp. 7 (*10), 8 (*12).)

The demurrer to the bill of complaint was as follows:

"Comes the Defendant, the Western Union Telegraph Company, for the special purpose and no other, until the question herein raised is decided, of objecting to the jurisdiction of this Court, by protestation, and confessing or acknowledging all or any part of the matters or things in said bill of complaint contained to be true, in such manner and form as the same are herein set forth and alleged, demurs to the said bill and for the cause of demurrer shows:

1. Because it appears from the face of the bill that neither the Plaintiff nor the Defendant is a citizen, resident or inhabitant of the southern division of the Southern District of Mississippi.
2. Because Section 919 of the Code of Mississippi set out and relied upon in said bill as conferring jurisdiction upon this Court does not confer jurisdiction and could not. The jurisdiction of this Court being determined by the Constitution and laws of the United States.
3. Because the said Section 919 applies only to the suits brought by residents of the State of Mississippi against foreign corporations in the State Courts and was not intended in any way to affect the jurisdiction of the Federal Courts, or suits brought therein.
4. For other reasons apparent."

Rec. p. 36 (*54).

The demurrer was sustained by the District Court and the cause dismissed for want of jjurisdiction. Rec. p. 37 (*56).

ASSIGNMENTS OF ERROR.

The following are the assignments of error:

"Comes the Louisville & Nashville Railroad Company, the Plaintiff in Error, by its counsel, and respectfully represents that it feels itself aggrieved by the proceedings and decree of the United States District Court for the Southern Division of the Southern District of Mississippi, made on the 9th day of July, 1912, and filed July 13, 1912, in the above entitled cause, and assigns error thereto as follows:

1. The Court erred in sustaining the demurrer to the bill of complaint, and in decreeing that it had no jurisdiction of said cause and dismissing the bill of complaint for want of such jurisdiction.

2. The Court erred in sustaining the demurrers to the bill of complaint and in decreeing that the bill of complaint by which said cause was commenced is not a bill to remove clouds from title to lands in the Southern Division of the Southern District of Mississippi, and that said Court has no jurisdiction over the defendant in said suits and that the bill of complaint be dismissed for want of jurisdiction.

3. The Court erred in sustaining the demurrer to the bill of complaint and in decreeing that the bill of complaint by which said cause was commenced is not a bill to remove clouds from title to lands in the Southern Division of the Southern District of Mississippi, and that defendant is not suable in this cause in said district or division, but is suable only in the district whereof it is an inhabitant, and in dismissing the bill for want of such jurisdiction."

ARGUMENT.

I.

THE BILL OF COMPLAINT WAS FILED TO ENFORCE A CLAIM UPON AND REMOVE CLOUDS FROM THE TITLE TO PROPERTY IN THE DISTRICT WHERE THE SUIT WAS BROUGHT.

Under the allegation of the bill of complaint, Appellant

claims the exclusive right to the whole of its said rights of way in Jackson, Harrison and Hancock Counties, in the State of Mississippi, while Appellee claims the right to take possession of, and use parts of each of them. Appellee claims this right under and by virtue of three judgments, which if valid, confers the right it claims. The bill of complaint asserts the validity of Appellant's claim and seeks to enforce it by having the incumbrance which said judgments purport to create upon Appellant's rights of way, cancelled and the clouds upon its title to its rights of way, created thereby removed.

The specific grounds of demurrer, numbered consecutively from 1 to 3, are readily disposed of.

The purpose of the bill of complaint, as already stated, was to enforce a claim by Appellant to its rights of way, situate within the division and district where the bill was filed and to cancel the judgments so as to remove the clouds created by them upon Appellant's title (Rec. pp. 1 and 2), and where there is diversity of citizenship, a case of this sort is properly filed in the district where the property is claimed, or upon which the cloud rests.

Greeley vs. Lowe, 155 U. S., 58.
Jellinik vs. Huron Copper Mining Co., 117 U. S., 9.
Citizens Savings & Trust Co. vs. Illinois Central R. R. Co., 205 U. S., 46.

The second and third demurrer rests upon the idea that the bill of complaint relies upon Section 919 of the Code of Mississippi to confer jurisdiction upon the Court. That section reads as follows:

"Any corporation claiming existence under the laws of any other state, or of any country foreign to the United States, found doing business in this State, shall be subject to suit here to the same extent that corporations of this state are by the laws thereof, liable to be sued by any resident of this state and also as far as relates to any transaction had in whole or in part within this state, or any cause of action arising here. And any corporation

having any transaction with persons or having any transactions concerning property situated within this state, through any agent whatever, shall be held to be doing business here, within the meaning of this section." Par. XV. of the bill of complaint; Rec. p. 17 (*25).

Section 920 of the Code of Mississippi reads as follows:

"Process may be served upon any agent of said corporation found within the county where the suit is brought, no matter what character of agent such person may be; and in the absence of an agent, it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time of the transaction out of which the suit arises took place, or if the agency through which the transaction was had be itself a corporation, then upon any agent of that corporation upon whom process might have been served if it were the defendant. The officer serving the process shall state the facts, upon whom isssued, etc., in his return, and service of process so made shall be as effectual as if a corporation of this state were sued, and the process has been served as required by law; but in order that defendant corporation may also have effectual notice it shall be the duty of the clerk to immediately mail a copy of the process to the home office of the corporation by registered letter, the postage and fees of which shall be taxed as other costs. The clerk shall file with the papers in the cause a certificate of the fact of such mailing, and make a minute thereof upon the docket, and no judgment shall be taken in the case until thirty days after the date of such mailing." Par. XV of the bill of complaint; Rec. p. 17 (*26).

It is, of course, conceded that neither these sections, nor any other law in the State of Mississippi can confer jurisdiction upon the Federal Courts. These particular statutes do not even attempt to confer jurisdiction upon the State Courts. They merely subject a foreign corporation to suit in any court held in Mississippi, having jurisdiction, whether the suit be by a resident or a non-resident of that state. They are only declaratory of the general rule previously recognized in Mississippi, that a foreign corporation doing business in a state

other than that of its creation is, in such other state, subject to suit, both by a resident or a non-resident of such state.

Pullman Palace Car Co. vs. Lawrence, 74 Miss., 782; 22 Sou. Rep., 53.

Under Section 919 of the Code of Mississippi a foreign corporation is merely located for the purpose of suit in Mississippi, and under Section 920 the method of service of process upon such corporation is prescribed.

Under Section 57 of the United States Judicial Code of 1912, no order fixing the method of serving process is necessary when the defendant is found within the district, but where the defendant is not found within the district the Court must make an order prescribing how service shall be had.

Section 919 of the Code of Mississippi is set out in the bill of complaint, not for the purpose of showing that the Court had jurisdiction of the cause, or of the parties, but only to show that the defendant could be found in Mississippi and process there served upon it, and that no order prescribing the method of service of process was, therefore, necessary.

The jurisdiction of the United States District Court, relied upon in the bill of complaint, and shown by appropriate allegations, rests upon diversity of citizenship and the enforcement of claims to, and the removal of clouds upon property.

Except in certain cases, a suit between citizens of different states must be brought in the district where either the plaintiff or defendant resides. If there was no exception to the general venue prescribed in suits where the jurisdiction depends upon diversity of citizenship, this suit could not have been maintained in the United States District Court for the Southern Division of the Southern District of Mississippi.

The general rule as to venue is prescribed by Section 51 of the judicial code of the United States of 1912, but by the express terms of that section, cases provided for by Section 57 of the United States Judicial Code of 1912, are excepted from the general rule. Section 51 of the Judicial Code provides, among other things, that:

"Except as provided for in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Section 57 of the Judicial Code is one of the six excepted sections, and provides that:

"When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks."

As the bill of complaint in this case is brought to establish Appellant's exclusive right to its rights of way, and to remove from its title thereto, the clouds created by the several eminent domain judgments complained of, the suit is properly brought in the district where the rights of way are situated.

In the case of Dick vs. Foraker, 155 U. S., 404, it is said:

"The suit was one to remove a cloud from the title to real estate situated in the district where the suit was brought. The defendant was a citizen of another state. The case was obviously within the jurisdiction of the court."

See also cases supra.

The several judgments rendered in the alleged eminent domain proceedings each purports to condemn Complainant's right of way, and authorize the defendant to enter upon and take possession thereof. Par. VIII of the bill of complaint; Rec. pp. 7 (*10), 8 (*12), 10 (*15). Each purports to operate as a grant to the Appellee, the Western Union Telegraph Company, of certain rights in Complainant's rights of way, and Complainant's only redress is by a bill in equity, to cancel or annul these judgments, and enjoin the exercise of the rights which they purport to grant or convey.

> Vinegar Ben Lumber Co. vs. Oak Grove & Georgetown R. R. Co., 89 Miss., 84; 43 Sou. Rep., 292, 298.

This case, therefore, clearly comes within the provisions of Section 57 of the United States Judicial Code of 1912, and the Court has jurisdiction both of the subject matter and of the parties to the suit.

II.

THE COURT COULD NOT DECLINE TO TAKE JURISDICTION BECAUSE THERE WAS NO EQUITY IN THE BILL OF COMPLAINT TO REMOVE CLOUDS.

The fourth ground of demurrer is "For other reasons apparent." Under this ground of demurrer it was urged that the bill of complaint shows that the several judgments complained of are void upon the faces of the proceedings in which they were rendered, and do not, therefore, constitute clouds upon Appellant's title to its rights of way; that void judgments do not constitute clouds upon title to property.

Also that the judgments and the taking thereunder would not injure Appellant.

In the case of Ladew vs. Tennessee Copper Co., 218 U. S., 357, 361, a bill was filed seeking to enjoin the defendants from operating furnaces, smelters and ovens in proximity to com-

plainant's timber lands, upon the ground that the fumes from defendant's plant would destroy the timber upon complainant's property, and the contention was that the right to have defendant so use its property so as not to injure complainant's property constituted a claim to that property within the meaning of the 57th section of the Judicial Code of the United States.

The Court, speaking through Mr. Justice Harlan, refused to sustain the contention and held the suit to be a mere personal action to abate a nuisance. This is probably the case relied upon to sustain the decree of the District Court. In that case Complainant made no claim of any kind to Defendant's property, nor did Defendant make any claim to Complainant's property. No instrument existed which purported to create any claim or right to the property of either party, and no claim was made thereto.

In the case of the Citizens Savings & Trust Co. vs. Illinois Central Railroad Co., 205 U. S., 46, the bill was filed by an Ohio corporation as a stockholder in "The Bienville Company," et al., to set aside certain leases and conveyances of the "Bienville Company," and for an accounting, and it was held that if the property purporting to have been conveyed or leased was in the district where the suit was brought, then the suit was properly brought and the Court had jurisdiction. The Court declined to consider whether the allegations of the bill entitled the Complainant to relief or not. Upon this subject the Court, on page 58, said:

> "We express no opinion upon the question whether, upon its showing, or in the event the allegations of the bill are sustained by proof, the plaintiff is entitled to a decree giving the relief asked by it. There was no demurrer to the bill as being insufficient in equity. The only inquiry now is whether, looking at the allegations of the bill, the suit is of such a nature as to bring it within the act of 1875, as one to remove incumbrances or clouds upon real or personal property within the district where the suit was brought, and, therefore, one local to such district."

In the case at bar, it is clearly shown that Complainant owns the rights of way, subject to such interest therein, if any, as were created by the judgments complained of; that the Defendant claims a right to the possession and use of parts of Complainant's rights of way under and by virtue of such judgments. The bill seeks to cancel these judgments as clouds upon Complainant's title and to enforce and protect its claim to the exclusive use of its entire rights of way.

~~If we concede~~ Defendant's contention, IS that under the allegations of the bill, the judgments under which Defendant claims a right to the possession and use of parts of Complainant's rights of way, are void upon the faces of the proceedings under which they were rendered and that the judgments do not, therefore, constitute clouds upon Complainant's title. We discuss this question fully hereafter, but even if it justified the dismissal of the bill for want of equity, it would not deprive the District Court of jurisdiction.

When the bill was filed and the jurisdiction of the Court questioned, upon the ground that the bill was not a bill to enforce a claim or remove a cloud from property, the Court was confined to this inquiry—What is the purpose of the bill? It could not inquire whether the allegations of the bill entitled Complainant to the relief sought.

If, upon an examination of the bill, the Court had found that it was not the purpose of the bill to enforce a claim or remove a cloud, the Court should have declined to take jurisdiction as the Court did in the case of Ladew vs. Tennessee Copper Company. If, on the contrary, such appeared to be the purpose for which the bill was filed, the Court was obliged to take jurisdiction of the cause before it could determine whether the allegations of the bill were sufficient to entitle the Complainant to relief, and had the demurrer attacked the bill upon the ground that it contained no equity to cancel the judgments complained of, as clouds upon Appellant's title, because the allegations of the bill showed that such judgments were void upon their faces, the Appellee would have thereby waived the want of jurisdiction in the Court.

Western Loan & Savings Co., vs. Butte & Boston Consolidated Mining Co., 210 U. S., 368.
Texas Co. vs. Central Fuel Oil Co., 194 Fed. Rep., 1, 9.

If, then, the demurrer presented the question of want of equity in the bill, to cancel the judgments as clouds upon the title, the question of jurisdiction was waived; if, on the other hand, the demurrer did not raise that question, then that question was not before the Court.

III.

THE BILL OF COMPLAINT WAS NOT, HOWEVER, WITHOUT EQUITY.

The three judgments were attacked by the bill of complaint upon a number of grounds common to each of them, and the judgments in Jackson and Harrison Counties were further attacked upon the ground that the appointments of the justices of the peace for the organization of the eminent domain courts were not made by the respective clerks of the Circuit Courts in these counties, but by their deputies. Appellee claimed that for this reason the Jackson and Harrison County judgments are void upon the faces of the respective proceedings in which they were rendered and do not, therefore, constitute clouds upon Appellant's title to its rights of way and that under the allegations of the bill the invalidity of each judgment is also apparent upon the face of the eminent domain proceedings, because of the unconstitutionality of the eminent domain laws of Mississippi. These contentions are addressed to the equity of the bill and could not be made without waiving the question of jurisdiction which was the sole question before the Court at the time it rendered the decree that is complained of, but if the Defendant's could, without waiving the question of jurisdiction, attack the equity of the bill such attack could not be successfully made.

Under the laws of the State of Mississippi, no opportunity is offered the property owner to be heard during the progress

of the eminent domain proceedings upon any defenses he may have to the condemnation of his property. This alone is probably not a good ground of attack upon the judgments as having been obtained without due process of law, for under the decisions of the Supreme Court of Mississippi, all defenses to the condemnation proceedings can be subsequently set up in a bill in equity such as was filed in this case, to annul the judgments and enjoin an entry under them.

Vinegar Bend Lumber Co. vs. Oak Grove & Georgetown R. R. Co., 89 Miss., 84; 43 Sou. Rep., 292, 296.

The right to set up in a bill in equity any defenses that the land owner may have to the eminent domain proceedings, is the only thing that prevents such proceedings from operating to take the property of the land owner without due process of law.

Freedland vs. Williams, 131 U. S., 405.

It is necessary to due process of law that at some stage the complaining party shall have an opportunity to be heard in some regularly established proceedings.

Simon vs. Craft, 182 U. S., 427, 437.
American Land Co. vs. Zeiss, 219 U. S., 47.
Appleby vs. Buffalo, 221 U. S., 524, 532.
Twining vs. New Jersey, 211 U. S., 78, 111.

Under the decisions of the Supreme Court of Mississippi, binding upon this Court, the right to challenge the eminent domain proceedings by a bill in equity is inherent in and a part of the statutory authority to exercise the right of eminent domain and is essential to the constitutionality of the chapter of the Code on eminent domain.

Vinegar Bend Lumber Co., vs. Oak Grove & Georgetown R. R. Co., 89 Miss. 84, 43 So. 299.

In this case the Court holds that except for the right to file a bill in equity, and set up any defenses that the land owner may have against the condemnation of his property, the chap-

ter of the Code of Mississippi upon eminent domain would not afford due process of law, and would be void upon its face.

The general, but not the universal, rule is that equity will not entertain jurisdiction to cancel as a cloud upon title an instrument that is void upon its face. In some states the rule is qualified so as not to apply to cases where it requires legal learning and acumen to determine whether the instrument is upon its face valid or void.

Merchant's Bank vs. Evans, 51 Mo., 335.
Pollibain vs. Reverly, 81 Sou. West., 182.
Mining Co. vs. Coyne, 147 Sou. West, 148.
Perkins vs. Baer, 68 Sou. West, 939.
Verdin vs. St. Louis, 33 Sou. West, 480.

In other jurisdictions the rule is repudiated in its entirety.

Schofield vs. City of Lansing, 17 Mich., 437.
Day Land Co. vs. State, 4 Sou. West, 865.
3 Pomeroy's Equity Jurisprudence, Section 1399.

Upon this last proposition, authorities might be multiplied, but the proposition itself is not deemed material to this discussion.

In other states the rule is changed by statute. This is the case in New Jersey and Mississippi.

In New Jersey, the statute reads as follows:

"When any person is in peaceable possession of lands in this state, claiming to own the same, and his title thereto, or to any part thereof, is denied or disputed, or any person claims or is claimed to own the same, or any part thereof, or any interest therein, or to hold any lien or encumbrance thereon, and no suit shall be pending to enforce or test the validity of such title, claim or encumbrance, it shall be lawful for such person so in possession to bring and maintain a suit in chancedy to settle the

title to said lands, and to clear up all doubts and disputes concerning the same.

Section 550 of the Code of Mississippi, of 1906, relates to the same subject matter, and reads as follows:

> "When a person, not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right or title thereto, which may cast doubt or suspicion on the title of the real owner, such real owner may file a bill in the Chancery Court to have such conveyance or other evidence or claim of title canceled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not; and any person having the equitable title to land may, in like cases, file a bill to divest the legal title out of the person in whom the same may be vested, and to vest the same in the equitable owner."

In the case of Bogert vs. City of Elizabeth, 27 New Jersey, Equity, page 568, the owner of a lot of land filed a bill to cancel a conveyance of his property made under a sale for the payment of a paving assessment, upon the ground that the proceedings under which the sale was made were illegal and void. The Court first discussed the proceedings under which the sale was made, and concluded the discussion as follows:

> "It is consequently clear that the sale of the complainant's land was an empty form, and passed no title to the city."

The Court then discussed the conflict between the Courts as to whether a Court of Equity will cancel an instrument which is void upon its face, for the purpose of removing a cloud upon the title to property, and then says:

> "In the case now before this Court the illegality of this sale and of all the proceedings leading to it is, at first

view, so conspicuous, that if, in this state, the question of the jurisdiction of the Court had to be decided from consideration derived from general principles, it is easy to see that a conclusion could not be reached without difficulty. But this is not the case, for the inquiry is controlled by the act to quiet titles, passed March 2, 1870."

The Court then quotes the act which is set out above and proceeds as follows:

"The object of this enactment, I think, is obvious: it was to extend the jurisdiction of the Court of Equity over the class of cases embracing the present one. Unless this was the design, I am at a loss to assign to it any office, for the jurisdiction of the Court, to the extent of the English and New York rule, could not have been deemed in doubt. The act is plainly remedial, and its language is very comprehensive, and in my judgment it should be construed to give jurisdiction in every case in which any claim or lien upon real estate appears to be asserted, or to exist. It is highly desirable that land should be freed from every lurking and unsubstantial claim, for even the suspicion of such claim, no matter how ill-founded, affects the value of the property when on sale. The policy which the statute is designed to promote is beneficial and enlightened, and it should be received with favor. It provides adequate checks against abuse, for it declares that if the defendant shall suffer a decree pro confesso to be taken, such decree shall not carry costs; and if he shall deny that he claims any interest or encumbrance in the premises, he shall be entitled to costs. I cannot see why under these safeguards against vexation, an owner of land should not have the privilege, in every imaginable case, of putting to the test, everything which presents a suspicious appearance against his title. The sale in the present case was impressive by being made under a city ordinance, conducted by official authority, and in the course of a procedure presenting, to the unprofessional eye, the ordinary marks of legality. Its effect, I cannot doubt, would be to detract, in a considerable degree, from the market value of the land. In my opinion, the statute in question can have no more appropriate use than in its application to this situation."

In the case of Cook vs. Friley, 61 Miss., page 1, a bill to remove a cloud was filed, and the Court said:

"If the complainant is the real owner of the land, and the defendant either has any evidence of title thereto, or asserts any claim or pretends to have any right or title thereto, which may cast doubt or suspicion on the title of the real owner, such real owner may exhibit his bill against such person to have such evidence of title canceled or the cloud, doubt or suspicion removed from the title.

The statute 1833, of the Code of 1880, not only authorizes the real owners to file his bill to cancel a paper title, but also to remove the cloud, doubt or suspicion which may spring from the assertion of claim or pretense of right or title thereto by the defendant, who without any muniment of title may assert a claim or pretend to have right or title. The purpose was to give the real owner a remedy against one who asserts any claim or pretends to have any right or title to such owner's land, in analogy to the right of action by the canon law for jactitation of marriage. The real owner is entitled to protection against jactitation of title to the disparagement of his real ownership. He may bring into court one who asserts any claim or pretends to have any right or title to his land, and require him to vindicate his claim or submit to its extinguishment by decree of the Court. The defendant in such case must maintain his claim or right, or it will be disposed of by decree against him. If he disclaims all right or title, it is a mere question of costs. If he asserts a claim or right as to the land, its validity will be passed on by the Court. All that the complainant need aver is that he is the real owner, and that the defendant is not, but asserts claim or pretends to some right to his land so as to cast doubt or suspicion on his title, which he seeks to have disposed of as a cloud on his title—clearing it by decree of the Court."

In the case of the Peoples Bank of New Orleans vs. West, 67 Miss., 729; 7 Sou. Rep., 516, an attachment was levied and the property sold thereunder, and the deed made to the purchaser was attacked by a bill in equity upon the ground that the attachment proceedings were void, and the deed made

thereunder, a cloud upon the owner's title.

The Court discussed the validity of the attachment proceedings and reaches the conclusion that they were void and then concludes as follows:

> "When the complainant shows a perfect title, legal or equitable, and the title of the defendant is shown to be invalid, it is, in the nature of things, a cloud upon the title of complainant and should be canceled."

In the case of Drysdale vs. Biloxi Canning Factory, 67 Miss., 534; 7 Sou. Rep., 541, the property had, as in the last case, been levied on under attachments and sold, and the bill was filed to cancel the deed thereto as a cloud upon the title to the property.

The Court discusses the irregularity of the attachment proceedings, and holds that they were void and the deed a cloud upon the title, as follows:

> "The flagrant disregard of these plain statutory requirements, designed to give a non-resident defendant notice of the pendency of an attachment suit against him, must be held to vitiate and nullify all subsequent proceedings in the causes. Without any former adjudications on this point (and there are several in our reports) it seems incredible, almost, that any sane suitor should begin proceedings under our attachment laws, and hope to win in a legal contest, in despite of his gross neglect of the simplest and plainest provisions of the statutes on the subject of attachments. From the record, as it appears here, the appellant was entitled to have the relief prayed in his bill."

See also:

Hurley vs. Board of Miss. Levee Commission, 76 Miss., 141; 23 Sou., 580.

Gambrill & Co. vs. Saratoga Lumber Co., 87 Miss., 773; 40 Sou., 485.

Vinegar Bend Lumber Co. vs. Oak Grove & Georgetown R. R. Co., 89 Miss., 84; 43 Sou. 299.

It follows that under the influence of the Mississippi stat

ute an instrument void upon its face, or a mere claim that could not be enforced in any court may be annulled and cancelled as a cloud upon the owner's title; and when under the statute of a state a property owner has the right to resort to a state court of equity to cancel an instrument which is void upon its face, he also has the right to resort to a Federal Court of Equity for the same purpose if the other jurisdictional elements are present.

In the case of Reynolds vs. Crawfordsville Bank, 112 U. S., 405, a bill was filed to cancel a certain deed as a cloud upon the complainant's title and it was found by the Court, among other things, that the deed was "wholly inoperative, null and void," and a cancellation of it as a cloud upon complainant's title was decreed. An appeal was taken from this decree and the Supreme Court of the United States, on page 409, et seq., said:

> "The appellant next complains of the decree rendered by the Circuit Court, and his first objection is, that the Court had no jurisdiction to quiet the title of the appellee as against a deed averred by the bill and not denied by the answer to be void on its face. The contention is that a deed, void on its face, is not a cloud upon the title, and a claim of title under it is no ground for the interference of a court of equity. This objection is not tenable. It may be conceded that the Legislature of a State cannot directly enlarge the equitable jurisdiction of the Circuit Courts of the United States. Nevertheless an enlargement of equitable rights may be administered by the Circuit Courts as well as by the courts of the States. Broderick's Will, 21 Wall, 503, 520. And, although a State law cannot give jurisdiction to any Federal Court, yet it may give a substantial right of such a character, that when there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal, whether it be a court of equity, admiralty, or common law. Ex parte McNeil, 13 Wall., 236, 243.
>
> While, therefore, the courts of equity may have generally adopted the rule that a deed, void upon its face, does not cast a cloud upon the title which a court of equity would undertake to remove, we may yet look to the

legislation of the State in which the Court sits to ascertain what constitutes a cloud upon the title, and what the State laws declare to be such the Courts of the United States sitting in equity have jurisdiction to remove this was expressly held in the case of Clark vs. Smith, 13 Pet., 195, 203, where it was said by this Court: 'Kentucky has the undoubted power to regulate and protect individual rights to her soil and to declare what shall form a cloud on titles; and having so declared, the Courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the Legislature.'

The State of Indiana, where the present case arose, has declared by statute what kind of a claim against real estate is such a cloud upon the title as will support a suit to remove it. 1070 Rev. Stat. of Indiana, 1881, provides as follows: 'An action may be brought by any person, either in or out of possession, or by any one having an interest in remainder or reversion, against another who claims title to or interest in real property adverse to him, although the defendant may not be in possession thereof, for the purpose of determining and quieting the question of title.'

This act confers upon any one, against whom another, whether in or out of possession, claims an adverse title or interest in real estate, the substantial right of having the disputed title settled by action of the Courts.

Under this statute it has been decided by the Supreme Court of Indiana that it is sufficient to aver that the defendant claims some interest or title, or pretended interest or title, adverse to complainant, without stating what the title is. Marot vs. The Germania Building Association, 54 Ind., 37; Jeffersonville &c. R. R. Co., vs. Oyler, 60 Ind., 383.

The bill of complaint in this case complies with this rule by averring that 'said Reynolds is, under his deed' (from Baird, the assignee), 'claiming and asserting title paramount to the title of this complainant;' and the answer to the defendant admits that, under the deed executed to him by Baird, he is claiming whatever title to said lands the same confers on him.

The question whether, under such a statute as that of Indiana and under the facts stated, the Circuit Court had jurisdiction to render the decree complained of, has been, in effect, decided in the affirmative by this Court in the

case of Holland vs. Challen, 110 U. S., 15.

In that case, a statute of Nebraska was under review, which provided that 'an action may be brought and prosecuted to final decree by any person, whether in actual possession or not, claiming title to real estate against any person who claims an adverse interest therein, for the purpose of determining such interest and quieting the title.' The Court, speaking by Mr. Justice Field, declared in substance that this statute dispensed with the general rule of courts of equity, that, in order to maintain a bill to quiet title, it was necessary that the party should be in possession, and, in most cases, that his title should be established at law or founded on undisputed evidence or long continued possession.

If the equity courts of the United States in Nebraska could dispense with these well-established rules of equity, and administer the rights conferred by this statute, it is not open to question that, in this case, the Circuit Court could disregard a similar rule, and entertain jurisdiction of the appellee's case, and accord to him the rights conferred by the statute law, even though the deed under which the appellant claimed was void on its face.

As the same statute authorizes the Court to take cognizance of the case even when the title of defendant amounts to more than a mere cloud, and applies in every case when the defendant claims an adverse interest in or title to the property in controversy, it is clear that the assignment of error under consideration has no support."

In the case of Cowley vs. Northern Pacific Railroad Company, 159 U. S., 583, the Court says:

"Although the statute of a State or territory may not restrict or limit the equitable jurisdiction of the Federal Courts, and may not directly enlarge such jurisdiction, it may establish new rights or privileges which the Federal Courts may enforce on their equity or admiralty side, precisely as they may enforce a new right of action given by statute upon their common law side. Thus in ex parte McNeil, 13 Wall., 236, a statute of the State of New York giving to the pilot, who first tendered his services to a vessel, and was refused, a right to half pilotage, was held to be enforceable upon the admiralty side of the District Court. See also the cases of Broderick's Will, 21 Wall.,

503, 520, and Clark vs. Smith, 13 Pet., 195, 203. So in Reynolds vs. Crawfordsville Bank, 112 U. S., 405, a bill in equity under a statute of Indiana, which averred that a deed was void upon its face, was held sufficient to support the jurisdiction of the Circuit Court of the United States in that district, to quiet the title of the complainant as against such deed, although courts of equity had generally adopted the rule that a deed void upon its face does not cast a cloud upon the title, which a court of equity will undertake to remove. It was also said in Davis vs. Gray, 16 Wall., 203, 231, that 'a party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality. The wise policy of the Constitution gives him a choice of tribunal.' Other cases to the same effect are Holland vs. Challen, 110 U. S., 15; Marshall vs. Holmes, 141 U. S., 589; Johnson vs. Waters, 111 U. S., 640; Arrowsmith vs. Gleason, 129 U. S., 86."

To the same effect, see:

Chapman vs. Brewer, 114 U. S., 158.
Moore vs. Steinback, 127 U. S., 70.

It is submitted, therefore, that even if the District Court could, under a demurrer to the jurisdiction, have considered the question as to whether or not the bill contained equity, still the decree dismissing the bill for want of jurisdiction would have been errorenous as the bill contained equity to remove the cloud from Complainant's right of way in each of the counties.

Each application for condemnation alleges substantially as follows:

"Your petitioner further stipulates and agrees that if at any time in the future, after the erection of its poles, cross-arms and wires, it should become necessary for the said defendant **to change the location of its tracks, or construct new tracks, or side-tracks,** where the same do not now exist, and for such purpose to use and occupy that portion of said right of way on which petitioner's poles are, or may be, set, cross-arms placed thereon, and wires

strung, your petitioner will, at its own expense, upon reasonable notice from said defendants, remove said poles, cross-arms and wires to such other point or points on said defendant's right of way as shall be designated by said defendants." Rec. p. 30 (*45).

Appellee contends that under such allegation no injury can accrue to Appellant from the taking of its property, and that Appellant is, therefore, without remedy against such taking.

As heretofore pointed out, the only protection Appellant has under the laws of Mississippi against the taking of its property without due process of law and without just compensation, is by bill in equity, such as Appellant has filed in this case. Section 17 of the Constitution of Mississippi provides that:

> "Private property shall not be taken, or damaged, for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law; and whenever an attempt is made to take private property for use alleged to be public, the question whether the implicated use be public shall be a judicial question, and, as such, determined without regard to legislative assertion that the use is public."

The first section of the Fourteenth Amendment of the Constitution of the United States provides that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law."

In the face of these provisions Appellant contends that unused property can be taken for and devoted to public use, without just compensation and without due process of law, so long as the owner has no present use for it. The contention is untenable upon its face. Under it, vacant buildings could be taken and occupied for municipal purposes without just compensation and without due process of law.

Besides, under Section 550 of the Code of Mississippi hereinabove set out, the right to cancel the instrument or claim is given without regard to the damage resulting therefrom.

Hurley vs. Board of Miss. Levee Com'rs., 76 Miss. 141; 23 Sou., 580.
Can. Pac. vs. Moosehead Tel. Co., 76 Atl. R., 885.
Hyde vs. Minn., D. & C. P. R. R. Co., 123 N. W., 849
Spurlock vs. Dornan, 81 S. W., 412.

Appellee does not, however, in its several applications for condemnation, offer to vacate the property **whenever desired by Appellant for other use.** It only offers to "remove said poles, cross-arms and wires to such other point or points on defendant's right of way as shall be designated by defendants," and this only, should it become necessary for Appellant to change the location of its track, or construct new tracks or side-tracks where the same do not now exist, and for such other purpose to use and occupy that portion of said right of way at which petitioner's poles are, or may be set. It does not offer to so remove its appliances, should Appellant desire to use the portion of the right of way occupied by such appliances for telegraph purposes, or for any other use incident to the operation of a railroad, nor does it offer to remove its appliances in any event, except to some other point on Appellant's right of way.

Further discussion of this proposition is not deemed necessary.

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Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 337.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellee.

BRIEF FOR APPELLEE.

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In the Supreme Court of the United States,

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BRIEF FOR WESTERN UNION TELEGRAPH COMPANY.

Jurisdiction.

This case was heard in the court below on a special demurrer for want of jurisdiction (Record, pp. 36, 37). No other question was presented, or argued, or decided there, the point being that the court did not have jurisdiction of the parties. It was insisted on the hearing and in support of the demurrer that while the bill alleged that it was a bill to remove *cloud* this averment was a mere pretext to obtain jurisdiction, because all of the objections and grounds set up in the bill attacking the validity of the condemnation proceedings as being void, if correct, were aimed at the defects appearing on the face of the proceedings attacked. In other words, that if the proceedings were void, as claimed in the bill, they were void on their face, and therefore constituted no cloud and therefore the court had no jurisdiction; that the federal

statutes, Section 57 of the Judicial Code of the United States, under which the bill was admittedly drawn localizing certain actions, restricted those actions to suits to enforce liens upon or claims to property or *to remove encumbrances or liens or clouds upon title*, and that what constitutes clouds upon title has a well settled and defined legal meaning and signification, and that it is settled that an instrument void on its face, as shown by the bill of complaint, constitutes no cloud and that in such a case a court of equity has no jurisdiction.

See

Peirsoll vs. Elliott, 6 Pet., 95.
Devine vs. Los Angeles, 202 U. S., 313.
Phelps vs. Harris, 101 U. S., 370.
Mackall vs. Casilear, 137 U. S., 556.
Lyon vs. Alley, 130 U. S., 177.
Hannewinkle vs. Georgetown, 15 Wall., 547.

It is admitted by the appellant that the general rule is as stated, that is to say, that an instrument void on its face constitutes no cloud (Appellant's Brief, page 28). But it is sought to avoid the force of this general rule by the claim that by statute of the State of Mississippi and the decisions rendered construing this statute, a court of equity will entertain a bill for the cancellation as a cloud an instrument void on its face.

The contention of the appellee is that while the jurisdiction of the court is somewhat enlarged by the Mississippi statute, no case can be found in Mississippi holding that, where it appears from the bill of complaint either by its allegations or from the instrument itself which is made a part of the bill, that the instrument sought to be canceled is void upon its face, the court of equity will take jurisdiction. On the contrary, there is nothing in the Mississippi cases which indicates any purpose to abrogate or depart from the general rule, as we will endeavor to show later.

It is well enough here to call attention to the fact that counsel for the appellant in their brief refer to the *judgment* in the condemnation proceedings as being the thing attacked, as if it were a separate and distinct record or instrument. Under the statate of Mississippi, the judgment is but a part of the condemnation proceedings and the condemnation proceeding *as a whole*, including the judgment, is made the muniment of title and the record.

Section 1873, chapter 43 of the Code of Mississippi of 1906 is as follows:

> "After all the issues are tried and all proper entries are made, the record shall be signed by the justice and certified to be correct, *and the whole shall be filed in the office of the clerk* of the circuit court and shall remain as a record thereof. * * * Any person interested in such record may obtain a certified copy thereof from the circuit clerk and have the same recorded in the records of deeds."

In other words, under this statute, the muniment of title, is the entire record, and not a segregated part thereof, and the entire record stands in the nature of a deed and is recorded as such in the record of deeds. Our purpose in calling the court's attention to this point is to avoid the idea or impression that the court might have that the judgment was a separate instrument or document, apparently valid on its face, and resort must be had to the proceeding as evidence *aliunde* showing the invalidity of the judgment as in the case of a sheriff's deed or a tax deed based upon a void proceeding which does not constitute a part of the deed and which must be resorted to as evidence outside of the deed to show its invalidity. This is not the case. The entire proceeding, including the judgment, the form of which is prescribed by law, Section 1867, Code of Mississippi of 1906, is the record as we have shown above, and is recorded in the record of deeds as the muniment of title. No execution *except for costs* issues on this judgment or is contemplated. The amount of damage is fixed by it, and may be paid or not by the applicant.

We will now review the Mississippi cases. The Mississippi statute invoked by counsel for appellant is a very old statute, and appears unchanged in every published Code of the State, and there are many decisions bearing on this statute, but those which bear upon the particular question here presented are the ones to which we direct the court's attention.

In the case of Boyd vs. Thornton, 13 S. & M., Miss., decided in 1850, at page 344, speaking of this statute, the court says:

> "The statute is very broad and seems to authorize the true owner in all cases to apply to a court of

chancery for its assistance against any one who may have a deed, or other *evidence* of title which may form a cloud or may cast a shadow of doubt or suspicion on the title of the owner. Hutchinson's Code, 773. In terms it may seem to confer power on the court of chancery to try the strength of title in all cases, and thus to dispense with the well-known remedy at law by action of ejectment. For the present we shall not criticize the power of the legislature in this respect. In making an application of the statute, however, we must keep in view certain established principles which prevail in the administration of equity jurisprudence and hold that they are not abolished by the statute."

In Huntington vs. Allen, 44 Miss., decided in 1870, at page 662, the court says, referring to this statute and the question of jurisdiction:

"The jurisdiction takes its rise in the doctrines of *quia timet,* in order to give repose and peace to the party in possession, by virtue of a rightful claim or title against him who might vex or harass with suits after the right had been fairly tested in a court of law, or against a deed or evidence of title, which had been fraudulently obtained, and which might be set up after the evidence which could manifest its true character had become obscure, or had passed away. The terms used in the statute, expressive of the scope of the jurisdiction, viz.: '*cloud,*' '*doubt,*' '*suspicion,*' *quite distinctly imply that the instrument which creates them, is apparent rather than 'real'; is 'resemblance' rather than substance; obscures rather than destroys or defeats.*"

In Carlisle vs. Tindall, 49 Miss., at page 233, decided in 1873, the court said:

"The enlarged jurisdiction conferred by the statute (Code of 1871, Section 975) upon the chancery court, at the suit of the 'real owner,' to remove the 'cloud,' 'doubt' or suspicion, cast by 'a deed or other evidence of title,' upon the true title, must be considered in the light and by the aid of the doctrines of a court of equity, as applied to such *quia timet* bills."

"The statute gives the jurisdiction to the 'real owner,' whether he be in possession, or threatened to be disturbed in his possession."

"It has not yet been exactly defined within what limits the jurisdiction may be exercised. It could not have been designed to draw into a court of equity contestation about the relative value and merits of legal titles, so as to oust the court of law and jury of the right to try legal titles, especially if a suit were already pending at law. But in every case the complainant who comes into court upon a legal title must be prepared to show its validity, and that the opposing deed or other evidence, or pretense of title, is only *apparently* but not substantially efficient to overcome it."

The court cites in this case Boyd vs. Thornton, Huntington vs. Allen, *supra*.

In the case of Phelps vs. Harris, 51 Miss., decided in 1875, at pages 793, 794, the court says:

"Bills to remove a cloud from a title may fall under the head of relief, *quia timet*; they may occasionally be properly classed under bills for the surrender and cancellation of void instruments. The principle upon which these bills are based is simply that it is inequitable that a party in possession should be embarrassed by having hanging over him a hostile claim, which, although not actively asserted and not of any validity, is nevertheless calculated to affect the marketability of the title. * * *

"There can, however, be no doubt that a court of chancery has the undoubted right to have deeds or other evidence of title, constituting a cloud, doubt or suspicion over the title of the rightful owner of any real estate in this state, canceled, and such cloud, doubt or suspicion thereby removed, in a case properly before it for that purpose."

The court cites Huntington vs. Allen, *supra*, and Ezelle vs. Parker, 41 Miss., 526 and 527.

In Railroad Co. vs. Neighborn, 51 Miss., 412, decided in 1875, at page 421, the court says:

"A court of equity always had the jurisdiction to protect the title of the 'true owner in possession,' against adversary deeds and instruments, which had been obtained by fraud, and which might (after the evidence which would expose their true character, had

become obscure or faded away) be set up to vex and endanger the 'true owner'.

"The statute enlarges the principle so as to extend its benefits to the 'real owner', whether in possession or not, so that he may apply for the cancellation of *deeds* and other *evidences of title* which constitute a cloud upon his own title."

The court in this case cites Boyd vs. Thornton, Huntington vs. Allen and Carlisle vs. Tindall, *supra*.

In Griffin vs. Harrison, 52 Miss., decided in 1876, at page 896, the court says:

"The rules by which this case must be determined are chiefly laid down in Huntington vs. Allen, 44 Miss., 654: 'The statute in reference to the removal of clouds from titles enlarges the principle upon which courts of equity were accustomed to administer relief. It is very broad—allowing the real owner, in all cases, to apply for the cancellation of a *deed*, or other EVIDENCES of title, which casts a cloud or suspicion on his title. It is an ancient and well established rule, both in courts of law and equity, that a party must recover on the strength of his own title, and not on the weakness of his adversary.' The principle is very aptly stated in Banks vs. Evans, 10 S. & M., 62. 'He who comes into equity to get rid of a legal title, which is alleged to overshadow his own title, must show clearly the validity of his own title, and the invalidity of his opponent's.' Nor will equity set aside a legal title on a doubtful state of case. In further exposition of the same principle, it was declared in Boyd vs. Thornton, 13 S. & M., 344, 'the complaint must be prepared to sustain the entire fairness of his own title.' Tested by the rules thus declared, how stands the case at bar? The complainant shows a sale, a forfeiture, to the state for taxes in 1847. There is in the bill an allegation of redemption in 1848, but this is denied and there is no evidence in support of it. This casts a doubt upon the title of the complainants within the rules quoted from Huntington vs. Allen."

The case of Phelps vs. Harris, *supra*, was appealed from the Supreme Court of the State of Mississippi to this court, and is reported in 101 U. S., page 370. At page 375, this

court, having then under consideration the Mississippi statute, said:

> "'Those only', said Justice GRIER, 'who have a clear legal and equitable title to land connected with possession, have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title' (Orton vs. Smith, 18 How., 263, and see Ward vs. Chamberlain, 2 Black, 430, 444; West vs. Schnebly, 54 Ill., 523; *Huntington vs. Allen, 44 Miss., 654;* Stark vs. Starrs, 6 Wall., 402). And as to the defendant's title, if its validity is merely doubtful, it is more than a cloud, and he is entitled to have it tried by action at law; and if it is invalid on its face, so that it can never be successfully maintained, it does not amount to a cloud, but may always be repelled by an action at law (Overing vs. Foote, 43 N. Y., 290; Meloy vs. Dougherty, 16 Wis., 269). Justice STORY says: 'Where the illegality of the agreement, deed or other instrument appears upon the face of it, so that its nullity can admit of no doubt, the same reason for the interference of courts of equity, to direct it to be cancelled or delivered up, would not seem to apply; for, in such a case, there can be no danger that the lapse of time may deprive the party of his full means of defense; nor can it, in a just sense, be said that such a paper can throw a cloud over his right or title, or diminish its security; nor is it capable of being used as a means of vexatious litigation, or serious injury.' 2 Eq. Jur., Sec. 700, *a*.
>
> "The Supreme Court of Mississippi, in their opinion in the case between the present parties, which is reported in 51 Miss., 789, say: 'This jurisdiction of equity cannot properly be invoked to adjudicate upon the conflicting titles of parties to real estate. That would be to draw into a court of equity from the courts of law, the trial of ejectments. He who comes into a court of equity to get rid of a legal title which is allowed to cast a shadow on his own title, must clearly show the validity of his own title, and the invalidity of his opponent's. Bank vs. Evans, 10 S. & M., 35; Huntington vs. Allen, 44 Miss., 662.'"

The Mississippi cases which we have set forth above have been cited with approval in numerous subsequent cases, not always on the precise point involved here, but none of these cases have ever been overruled, either directly or by implica-

tion, the practice in this state being to expressly overrule cases where the principles announced are departed from. Some of these cases are cited in the following cases:

Hart vs. Bloomfield, 66 Miss., decided in 1888, at page 106.

Wilkinson vs. Hiller, 71 Miss., decided in 1893, at page 697.

Jones vs. Rogers, 85 Miss., decided in 1904, at page 826.

In addition to this, this statute has appeared unchanged in six published Codes of the State of Mississippi, beginning with Hutchinson's Code of 1848, Section 773, Code of 1857, page 541; Code of 1871, Section 975; Code of 1886, Section 1833; Code of 1892, Section 500; Code of 1906, Section 550. Therefore, under a familiar rule of construction these statutes have been enacted as incorporating the construction put upon it by the several decisions above referred to.

It was held in the case of Huntington vs. Allen, *supra*, at 662, as follows:

> "The terms used in the statute, expressive of the scope of the jurisdiction, viz.: 'cloud,' 'doubt,' 'suspicion,' quite distinctly imply that the instrument which created them is apparent rather than 'real;' is 'semblance' rather than substance; obscures rather than destroys or defeats."

In other words, it must be more than a mere nullity on its face. It must cast a *shadow*, a *doubt*, a *suspicion* or *cloud*, and, of course, this rule would apply where the bill claims, either directly or by necessary implication, that the instrument is void on its face, or where the instrument itself made a party of the bill is void on its face.

The enlargement of the jurisdiction of the state court referred to in the various decisions was not intended to do away with the rule so well settled, but the enlargement consisted of *(a)* allowing the real owners not in possession to file a bill to remove cloud: *(b)* or where the real owner is threatened to be disturbed in his possession or not, that is to say, the real owner can take the initiative although there has been no threat of disturbance; *(c)* whether the defendant be a resident of the State or not; and *(d)* in a class of cases

where the character of the defendant's claim is not known and where the owner may file a bill and compel the party asserting the claim to come into court and exhibit his claim of title in order that it may be passed upon by the court. It may be in this latter class of cases that the instrument when exhibited would be shown to be void on its face, but that does not alter the rule contended for that where the character of the claim is known and set forth in the bill, and is void on its face or claimed by the bill to be so, the court will not take jurisdiction.

In referring to this feature of the statute, the court said in the case of Cook vs. Friley, 61 Miss., 1:

> "The purpose was to give the real owner a remedy against one who asserts any claim or pretends to have any right or title to such owner's land, in analogy to the right of action by the canon law for jactitation of marriage. The real owner is entitled to protection against jactitation of title to the disparagement of his real ownership. He may bring into court one who asserts any claim or pretends to have any right or title to his land, and require him to vindicate his claim or submit to its extinguishment by decree of the court."
>
> "If the object of the bill is to cancel a particular evidence of title possessed by the defendant, it should be set forth in the bill as fully and particularly as known to the pleader,"

but it is not ground for demurrer if this is not set forth.

Counsel for the appellant cite the case of Cook vs. Friley and other cases, Mississippi, upon which we will comment later, and certain decisions of this court, in support of their contention that as the statute of Mississippi, as they claim gives jurisdiction to the court of equity to entertain a bill seeking to cancel an instrument which may be void on its face, the Federal court will take jurisdiction of the parties, although the bill does claim that the proceedings were void on their face.

Counsel cite in their brief, as sustaining their position that the Mississippi courts will entertain a bill seeking to cancel as a cloud upon title an instrument void on its face, although the instrument is set up in the bill and claimed by the bill to be void on its face, the following cases: Cook vs. Friley,

supra; Peoples Bank vs. West, 67 Miss., 729; Drysdale vs. Biloxi Canning Factory, 67 Miss., 534; Hurley vs. Mississippi Levee Commission, 76 Miss., 141; Gambrell Lbr. Co. vs. Saratoga Lbr. Co., 87 Miss., 773; Vinegar Bend Lumber Co. vs. Oak Grove R. R. Co., 89 Miss., 84. None of these cases support this position.

In the case of Peoples Bank vs. West, the proceeding was to cancel as a cloud upon the complainant's title a sheriff's deed held by the plaintiff, executed in pursuance of a sale under an attachment proceeding. The deed was not attacked as being void on its face. It was apparently valid, but the proceedings in the attachment suit were set up as showing that the sale was void for certain defects in the attachment proceedings, but these attachment proceedings are not a part of the deed, nor the deed a part of the attachment proceedings, but the attachment proceedings were evidence outside of the deed showing irregularities which rendered the deed void.

The same applies to the case of the Drysdale vs. Biloxi Canning Factory, 67 Miss., 534.

The case of Hurley vs. Board of Mississippi Levee Commission, 76 Miss., 141, does not touch the question. That was a bill filed to enjoin certain proceedings for the condemnation of land for levee purposes. It was a proceeding to restrain the parties from proceeding with the condemnation upon the ground that one of the commissioners was without right to the office. The proceeding was attacked *in fieri*, and the bill was in no sense a bill to remove cloud, and all that the court held was that the court of equity would entertain a bill under the circumstances to restrain the proceeding.

In the case of Gambrell Lumber Company vs. Saratoga Lumber Company, 87 Miss., 773, merely holds under the authority of Cook vs. Friley, *supra*, that a suit might be brought under the statute to cancel and remove a cloud upon any void title to land, whether such cloud be cast upon the perfect title by recorded instrument or by mere assertion of unknown but hostile claim; but the case goes further to hold that where there is a distinct admission of deraignment of title from a common source, such admission necessarily conveys the idea that complainant is advised of the nature and character of the adverse claim asserted by the defendant. In such state of

case, if the claim be a particular muniment of title, it must be specifically referred to.

Vinegar Bend Lumber Company vs. Oak Grove Railroad Company, 89 Miss., 84, does not touch the question here. That case merely holds that neither the eminent domain court nor the circuit court can consider the question as to whether condemnation is for a public use or a private use; that such questions must be determined in a court of equity by appropriate proceedings; that the eminent domain court and the circuit court are confined to the question of compensation.

On page 33 of their brief, counsel say:

> "It follows that under the influence of the Mississippi statute an instrument void on its face or a mere claim that could not be enforced in any court may be annulled and canceled as a cloud upon the owner's title; and when under the statute of a state a property owner has the right to resort to a state court of equity to cancel an instrument which is void upon its face, he also has the right to resort to the Federal Court of Equity for the same purpose if the other *jurisdictional elements are present.*"

In support of this position, counsel cite the following Federal cases: Reynolds vs. Crawfordsville Bank, 112 U. S., 405; Chapman vs. Brewer, 114 U. S., 158; Moore vs. Steinbach, 127 U. S., 70; Cowley vs. Northern Pacific Railroad Co., 159 U. S., 583; Devine vs. Los Angeles, 202 U. S., 333.

Now we concede that it is settled that under a certain stated case the courts of the United States sitting in Equity will proceed to grant relief in cases where the relief is afforded by the state statutes. It will be found, however, in examining the Federal cases cited by counsel bearing on this point that they are all cases in which the requisite jurisdictional grounds existed independently of the state statute. In other words, none of them were proceedings under Section 57 of the Judicial Code, or Sec. 8 of the Act of March 3rd, 1875, in which local jurisdiction is conferred upon the Federal Courts in a certain class of cases set forth in the statute. For instance, the case of Reynolds vs. Crawfordsville Bank, from which counsel quote, was a case in which the court had jurisdiction of the parties, and among other things the bill asked that a certain instrument be can-

celed as a cloud upon complainant's title. It was insisted, however, that courts of equity do not entertain jurisdiction to quiet title or remove a cloud therefrom when the instrument constituting the cloud *is void on its face*, or when, in order to enforce it, evidence which will inevitably show its invalidity and destroy its efficacy, must be offered. In answer to this, it was urged that as the state statutes of Indiana conferred jurisdiction in such cases, or gave the right to proceed in equity in such cases, that the Federal Courts would entertain such a bill. The court said on page 410 :

> "The appellant next complains of the decree rendered by the circuit court, and his first objection is, that the court has no jurisdiction to quiet the title of the appellee as against a deed averred by the bill and not denied by the answer to be void on its face. The contention is that a deed, void on its face, is not a cloud upon the title, and a claim of title under it is no ground for the interference of a court of equity. 'It may be conceded,' says the court, '*that the legislature of the state cannot directly enlarge the equitable jurisdiction of the Circuit Courts of the United States. Nevertheless, an enlargement of equitable rights* may be administered by the circuits courts as well as by the courts of the states. Case of Broderick's Will, 21 Wall., 520. And although a state law cannot give jurisdiction to any Federal Court, *yet it may give a substantial right, of such a character that when there is no impediment arising from the residence of the parties*, the right may be enforced in the proper Federal tribunal, whether it be a court of equity, admiralty or of common law. *Ex parte* McNeil, 13 Wall., 243."

Now, the very point which we are urging in this case is that there is an impediment arising from the residence of the parties (Record, p. 36). The attempt in the case at bar is to give the Federal Court jurisdiction of the parties to localize the action by virtue of certain provisions of the state statute, which provisions are not recognized as affording grounds for jurisdiction in the Federal Court. The very gist of the case here is that the court did not have jurisdiction of the parties. The impediment here, to the court's taking jurisdiction arises from the residence of the

parties, one being a citizen of the State of New York, and the other a citizen of the State of Kentucky and the State Statute cannot be looked to to determine the jurisdiction.

The case of Chapman vs. Brewer was a bankruptcy proceeding began in the District Court for the Western District of Michigan, a matter clearly within the jurisdiction of the court.

The case of More vs. Steinbach, 127 U. S., 70, was a suit brought in the Circuit Court of the United States for the District of California. The *defendants* were all residents of the State of California. One of the plaintiffs was an alien, and the other was a citizen of the State of New York, it was therefore a case in which the requisite diverse citizenship existed. The court, having jurisdiction of the parties to begin with, preceded to enforce a right given by the local laws of California and relied upon the cases of Reynolds vs. Crawfordsville Bank, and Chapman vs. Brewer, *supra.*

The case of Cowley vs. Northern Pacific Railroad Company, 159 U. S., 583, was a case removed from the state court to the Circuit Court of the United States for the District of Washington, and it was there held on authority of Reynolds vs. First National Bank of Crawfordsville, and other similar cases, that the Federal Court could administer a right given by the territorial statute. And that the party removing the cause to the Federal Court could not there object to the jurisdiction of the court.

The case of Devine vs. Los Angeles, 202 U. S., 333, is a distinct authority for the position which we assume here. It was claimed in that case, among other things, that the proceeding was one to remove cloud upon title. There was no diversity of citizenship, and it was further insisted that the suit arose under the constitution, laws and treaties of the United States, and it was contended that the Federal Court had jurisdiction of the case upon this ground. The court held that it could not take jurisdiction of the case as one to remove cloud upon title because the court of equity would not entertain a bill to remove as *clouds claims and threats and mere verbal assertions of ownership*, and further that a bill would not lie "invoking the equity interposition on the ground of removal of clouds, that decrees may be sought *adjudging statutes unconstitutional.*"

The court said :

> "If it were true that the statutes and charters referred to in the bill were unconstitutional as alleged, they *were void on their face, and could not constitute a cloud upon complainant's title.*"

The bill was dismissed for want of jurisdiction, but the court referred to the case of Boston & M. Consol. Copper &c. Co. vs. Montana Ore &c. Co., 188 U. S., 632, as stating the rule recognized by the usual chancery practice relating to bills quieting title to lands as prevails in the Federal Courts, and we refer this court to that case.

All of the Federal cases referred to by counsel as sustaining their position that the bill should be entertained because jurisdiction to entertain such a bill was conferred by the state statutes are cases in which the court had jurisdiction of the parties either by removal or upon the requisite diverse citizenship. In other words, that the court having obtained jurisdiction upon other grounds simply proceeded to administer the relief which was afforded by statute of the state in which the court was sitting.

In the case of Boston & M. Consol. &c. Co. vs. Montana Ore &c. Co., *supra*, the court referred to the case of Whitehead vs. Shattuck, 138 U. S., 146. In that case the court said, referring to the right of the party out of possession to maintain a bill to remove cloud :

> "Nor can the case of Reynolds vs. Crawfordsville First National Bank be deemed to sustain the plaintiff's contention ; it was there only held that the legislature of the state may be looked to in order to ascertain what constitute a cloud upon title, and that such cloud could be removed by a Court of the United States sitting in equity in a *suit between the proper parties.* Nothing was intended at variance with the law of Congress, excluding the jurisdiction of a court of equity where there was a full remedy at law."

In the case of Holland vs. Challen, 110 U. S., at page 21, the court said that a Federal Court having jurisdiction by adverse citizenship may administer relief under a state

statute permitting a suit to quiet title by one out of possession, although the plaintiff's title had not been established by law as would have been necessary but for the statute, although the ejectment was not maintainable since the property was unoccupied.

This case has been frequently cited; in fact, it seems to have been cited in all cases referred to by counsel, and in the cases which we have cited. In other words, all of the cases which we have been able to find in which the Federal Courts have undertaken to administer relief granted by the state statute are cases in which the court had acquired jurisdiction and of the parties, on other grounds, cases in which the court had the original jurisdiction and in which it was asked to administer certain relief afforded by the state statute.

In the case at bar, it is sought to give the Federal Court *original jurisdiction* by reasons of the provisions of a state statute enlarging the jurisdiction of the *state* court. This is not warranted by any decision of the Supreme Court of the United States which we have been able to find, in fact, the settled rule is to the contrary. The cases in which the Federal Court has original jurisdiction are those distinctly pointed out by Federal statute, and one class of cases is that dependent upon diverse citizenship, and the rule as to diverse citizenship is fixed by the statute, Section 51 Judicial Code. The proceeding in the case at bar was instituted under a Federal statute which applies to an exceptional class of cases where the jurisdiction is determined by the location of the property affected and not by the residence of the parties, and one of the class of cases in which jurisdiction was conferred without reference to the residence of the parties was where the proceeding was to remove *cloud upon title*. What constitutes *cloud upon title within the meaning of the Federal statute*, which will give a Federal Court original jurisdiction, must be determined with reference to the meaning of the term established by the general principles of Equity Jurisprudence which pertain in the Federal Courts. Nothing is better settled than the rule that a Federal Court will not entertain jurisdiction of a bill claimed to be a bill to remove cloud where the instrument attacked is shown by the bill, or by the instrument itself, to be void on its face. We must take

it that the term " bills to remove clouds," as used in the Federal statute, means clouds as recognized by the Federal Courts, and that its jurisdiction will be confined to such cases and cannot be enlarged by State statutes which give state courts jurisdiction to entertain suits or to afford relief in cases which do not meet the requirements as settled by the general rules of equity jurisprudence which prevail in the Federal courts (see cases cited (*ante*, p. 2).

Conferring jurisdiction upon the Federal court is one thing, while the Federal court administering certain relief in cases where it has jurisdiction is quite another. The bill in this case cannot be maintained unless it is held that the state statute has enlarged *original jurisdiction* upon the Federal court to the same extent that the jurisdiction of the state court was enlarged. The Federal court as such has jurisdiction of bills to *remove clouds from title*, that, however, as we have stated before, is determined not by any state statute but by the general rules of equity jurisprudence and Federal statutes. Under the state statute the state court has jurisdiction in cases where the owner of the property is out of possession, the Federal court has not. Whitehead vs. Shattuck, 138 U. S., at page 146. Under the state statute the state court has jurisdiction of a bill where the adverse claim consists of threats or mere verbal assertions of ownership, the Federal court has not. Devine vs. Los Angeles, 202, U. S., at page 335. Under the state statute, if claim of counsel is correct, the state court can entertain a bill to cancel as clouds upon title an instrument void upon its face, the Federal court cannot. Devine vs. Los Angeles, *supra*. See also, 5 Peters, 95; Ewing vs. St. Louis, 5 Wall., 413; Hennewinckle vs. Georgetown, 15 Wall., 547; Phelps vs. Harris, 101 U. S., 370; Mackall vs. Casilear, 137 U. S., 556; Lyon vs. Alley, 130 U. S., 177.

As we have said before, that while it was alleged that the pleading was to remove cloud upon title, yet all of the grounds set up showed that the proceeding attacked in this case were void on their face, if void at all.

We have shown in the preceding part of our brief that the record of the proceedings, including the judgment, is an entirety, and must be looked at as a whole. The records of the proceedings are made exhibits to the bill of complaint,

some parts of them incorporated in the bill itself. The contentions of the appellant are:

FIRST. That the eminent domain court had no jurisdiction because the clerk's appointment by the justice of the peace who was to preside at the eminent domain court was not indorsed upon the application presented to the clerk (Transcript, page 10).

This is a matter which appears upon the face of the record.

SECOND. That the appointment in two cases was made by deputy clerks, and not the regular clerks (Transcript, page 11).

THIRD. That the laws of the State of Mississippi giving the right of condemnation to telegraph companies did not give the right to condemn property already devoted to a public use (Transcript, page 11).

This point also arises on the face of the proceedings.

FOURTH. That the laws of the State of Mississippi did not give the right to condemn the rights of way of railroad companies without the consent of the railroad company, and that the consent of the complainant had not been given (Transcript, page 11).

This matter also appears upon the face of the proceedings.

FIFTH. That the laws of the State of Mississippi did not give to telegraph companies the right to condemn the rights of way of railroad companies for the purpose of maintaining an existing line (Transcript, page 12).

SIXTH. It was then urged that the proceedings were void because they violated certain provisions of the Constitution of the State of Mississippi, and that chapter 43 of the Code of Mississippi on Eminent Domain, under which the proceedings were canceled, was violative of certain provisions of the Constitution of the United States, as set forth in the bill of complaint (Transcript, pp. 12-19).

All of these matters are matters arising upon the face of the proceedings. (See Devine vs. Los Angeles, *supra*).

So we feel that we are warranted in saying that the court had no jurisdiction for the reason that all of the allegations of the bill were addressed to matters apparent upon the face of the eminent domain proceedings.

As to the fifth ground, it is admitted that the statute of the state of Mississippi only gives the right to telegraph companies to condemn for "new lines," and does not give the

right to condemn for the maintainence of an existing line. It will be seen, however, from an inspection of the exhibits of the proceedings set forth in the bill of complaint that these proceedings were for condemnation for a new line. This is expressly set forth in each one of the petitions (Transcript, pp. 22, 26, 30), and the judgment confines the applicant, the Telegraph Company, to the construction of a line as prayed in the petition, and the fact that the Telegraph Company might undertake to violate the rights which it had obtained under the condemnation proceeding is a mere matter of conjecture and would not afford ground for a bill of this character. Under the Federal cases, mere verbal threats to do this or apprehension that it may be done, does not afford ground for entertaining a bill to remove cloud (See Devine vs. Los Angeles, *supra*).

The bill is in no sense a bill to remove cloud but is a bill seeking to perpetually enjoin the Telegraph Company from directing and operating a line of telegraph on the right of way of the Railroad Company. The averment that it is a bill to remove cloud is but a "mere pretext to obtain jurisdiction." What is said in the case of Devine vs. Los Angeles, *supra*, at page 335, is applicable here. The court says :

> "The test as to when a cloud is or is not cast, as stated by Mr. Justice FIELD, then chief justice of California, in Pixley vs. Huggins, 15 Cal., 127, and reasserted in Hannewinkle vs. Georgetown, 17 Wall., 547, 21 L. Ed., 231, is undoubtedly applicable and demonstrates that the assertion of unconstitutionality cannot be resorted to to maintain Federal jurisdiction as constituting a cloud. The averment of unconstitutionality in such circumstances is *a mere pretext to obtain* that jurisdiction.

The prayer of the bill is that the condemnation proceeding be held void as violative of the Fourteenth Amendment of the Constitution of the United States, as well as for other reasons assigned in the bill of complaint, and that the Telegraph Company, be "permanently enjoined" from entering upon, or taking possession of, or erecting any wires or other appliances upon the right of way, etc., after the termination by notice or otherwise of the contract under which the Telegraph Company

now occupies the right of way of its telegraph lines (See Transcript, page 20).

This is merely a proceeding for an injunction masquerading under the guise and title of a bill to remove cloud (See Ladew vs. Tennessee Copper Co., 218 U. S., 357).

On the Merits.

All the questions presented are questions of law arising on the face of the bill. The prayer is that the several condemnation proceedings be declared void for the reasons set forth in the bill and that the Telegraph Company be permanently enjoined from proceeding under them. The proceedings are claimed to be void for certain alleged irregularities therein, and also because the enforcement of them would be violative of the Fourteenth Amendment of the Constitution of the United States.

It is claimed in the bill:

1st. That the proceedings are void because the appointments of the justices of the peace were not endorsed upon the application as provided by section 1856 of the Code of 1906, but were made in writing on separate sheets and filed with the papers.

2d. That the proceedings are void because the writs and other process were issued in the two cases by deputy clerks and not by the regular clerk.

3d. The proceedings are claimed to be void because it is alleged that the right of way of the Railroad Company being properly already devoted to a public use, no authority is conferred upon the Telegraph Company to condemn property so devoted.

4th. The proceedings are claimed to be void because the Telegraph Company is only authorized to exercise the power of eminent domain for the construction of *new lines*, and that it was not the purpose of the Telegraph Company to construct new lines as alleged in its applications, and authorized by the judgment, but to maintain the existing line.

It will be seen, therefore, as we stated in the outset, that the fundamental purpose of this bill is to obtain injunctive relief by excluding the Telegraph Company entirely and per-

manently from the use of the right of way of the Railroad Company by perpetual injunction.

We will now consider certain of the objections to the proceedings set up in the bill in the order in which we have presented them, in so far as the state statute and decisions bear on them.

FIRST. As to the failure of the clerk to endorse his appointment of the justices of the peace upon the application. It will be borne in mind that it is shown by the bill that the appointment of the justices of the peace was made in writing and filed with the application. In order to fully appreciate the force of this objection, it would be well to consider the statute, chapter 43, of the Mississippi Code of 1906, under which the proceedings were instituted, and the purposes for which the eminent domain court is constituted and the scope of its power and authority.

It is perfectly manifest from the most casual reading of the statute that it was the purpose of the Legislature to divest the proceedings as far as possible of all mere technical and formal matters relating to the procedure.

In the case of Vinegar Bend Lumber Co. vs. Oak Grove, etc., Railroad Company, 89 Miss., 84, this court held that the eminent domain court exercised no judicial function whatever. Neither the justice of the peace nor the jury, nor the two together, exercised any judicial function whatever. That the sole issue which can be tried by the eminent domain court is the one of compensation, the ascertainment by the jury of the amount of damages to be awarded to the land owner in the proceeding. The justice of the peace merely assembles the jury, and presides, gives an instruction which is provided by the statute, Code of 1906, Section 1865, after the jury has heard the testimony. The jury views the premises. The form of judgment to be rendered is prescribed by statute (Section 1867, Code of 1906).

It is manifest that the sole purpose of requiring the appointment of the justice of the peace to be endorsed on the petition was to preserve a record of the appointment. The substantial requirement was the preservation of the record, and if this appointment is made in writing by the proper officer and filed with the application, it is certainly a substantial compliance with the statute. But, as we have stated in

the outset, it is manifest that the legislature did not intend, that these proceedings should be hampered by mere formalities in proceedings and mere technical objections. It is expressly provided by section 1862, of the Code of 1906, that no irregularities in drawing, summoning, or empaneling the jury shall vitiate the verdict or judgment. The form of the verdict is prescribed (section 1866, Code of 1906), and it is provided that any informal or unsigned verdict may be amended. It is provided further (section 1871, Code of 1906), that if the defendant or land owner shall appeal, the appeal shall not operate as a supersedeas, nor shall the right of the applicant to enter in and upon the land and appropriate the same to the *public use be delayed*. In other words, the whole spirit of the statute is that the proceedings shall not be delayed nor hampered nor trammelled by mere technical objections, mere matters of form and procedure, and that no judgment or verdict rendered shall be vitiated by mere irregularities in the proceedings. In other words, the rule as to literal compliance does not apply under this statute.

It must be assumed that all of the proceedings, except in the two particulars set out in the bill—that is to say, the point under consideration and the second point, that the deputy clerk instead of the regular clerk issued the writ and made appointment—were regular in all substantial particulars. That is to say, that the Railroad Company was duly notified, that the court was duly assembled, that the justice of the peace was a regular and competent justice of the peace, that the parties duly appeared, that the testimony was taken, the jury instructed, the premises viewed, and the verdict for the damages rendered as prescribed by the statute. We say this must be assumed, because no objection whatever is raised in the bill to any of the proceedings except in the particulars above named. No complaint is made of the award, no appeal was taken to the circuit court, where the matter could be tried *de novo* had the Railroad Company been dissatisfied with the award and where any irregularity affecting this award would have been cured, but the Railroad Company deliberately abandoned its right to the appeal and raised these technical objections to the proceeding by a bill in equity seeking an injunction. The statute provides that either party may appeal to the cir-

cuit court. If the land owner is dissatisfied with the award, an appeal may be taken to the circuit court and there the whole matter be tried *de novo* as other issues are tried in that court, and all of the rights of the land owner affected by the issue which that court can try, that is to say, in the matter of proper compensation, will be fully guarded by the instructions of a court possessing full judicial power. The remedy as to the award is adequate and complete.

Even in Eminent Domain statutes which are not expressly to be liberally construed, in matters of form and procedure, as our statute is, it is held that a substantial compliance with the statute is all that is required. (See Lewis on Eminent Domain (3 Ed.), 1077; 24 Wendell, 367; 45 Hun, 310.)

The Railroad Company was in no way prejudicially affected by the fact that the clerk made the appointment of the justices of the peace in writing on a sheet of paper separate from the application, and did not endorse it upon the application itself. The appointment was in writing and preservation of a record of the same being the substantial matter, the requirement or provision as to this record being made or endorsed upon the application was merely directory.

Counsel will doubtless cite numerous cases to the effect that statutes providing for the power of eminent domain must be strictly construed. We are fully aware of the general rule, but this rule of strict construction has its limitations, and the Court must necessarily consider it in the light of the terms of the Mississippi statute and its manifest spirit and purpose. It is thoroughly settled in the Vinegar Bend Lumber Company Case, above referred to, that the substantial constitutional rights of the land owner can be fully protected by resort to a bill in equity, but no substantial or constitutional right of the complainant is shown to be violated by the manner in which the clerks made their records of the appointments of the justices of the peace to act in these cases.

Furthermore, although we deem it entirely unnecessary, for it to have been done, in two of the cases, as shown by the bill, the endorsements were made upon the application and new writs issued. This, however, we consider to be wholly unnecessary. The statute had been substantially complied with.

Counsel insists, on page 47 of the brief, that the rule is

that all *material requirements* must be literally complied with and such compliance must appear on the face of the record. We do not concede that the endorsement of the appointment of the justices of the peace on the petition itself is a material requirement. The material requirement is making a record of the appointment and that the justices of the peace were appointed and appointed in writing appears on the face of the record. Counsel cite two Mississippi cases. Each of these cases, however, were condemnation proceedings instituted under the special charter of railroad companies granted before the adoption of chapter 43 of the Code of Mississippi of 1906, the proceedings themselves having been had before the adoption of this general law.

The first of the cases cited is that of White vs. Memphis &c. Railroad Co., 64 Miss., 566. In that case the charter of the railroad company provided that if condemnation proceedings became necessary, application could be made to a justice of the peace who should issue his warrant to the sheriff requiring him to summons a jury of twelve *disinterested freeholders* of the county to assess the value of the land. It was held under this provision if the record of the condemnation proceedings showed that award was made by "twelve persons" without showing that they were "disinterested freeholders" the award would be void and might be treated as a nullity, even in a collateral proceeding. In other words, the court held that the requirement as to disinterested freeholders was a substantial and material jurisdictional fact and that compliance with it must appear on the face of the record of the proceeding. Madden vs. Railroad Co., 66 Miss.

The other case cited was a similar holding, the proceeding being instituted under the special charter of the Railroad Company, the court holding that the requirement in the charter that appraisement should be by "disinterested commissioners" was material, and it was necessary that the record should show that it was made by "disinterested" commissioners; that these were essential jurisdictional facts. Of course, it needs no argument to show that the parties making the award should be disinterested; this is a very material matter and a very different matter from the mere manner of the appointment of the justices of the peace under the Code,

chapter 43, the justices of the peace having nothing whatever to do with making the award, their only function being that of a ministerial officer to preside at the meeting. He did not participate in any way in the award. The chapter 43 of the Code of Mississippi of 1906 was drawn for the purpose of simplifying eminent domain proceedings, prescribing the mode of exercising the right of eminent domain by a general law applicable in all cases, and it was the manifest purpose of the legislature to divest these proceedings of any mere technical and formal objections,—that is perfectly evident on the face of the statute.

SECOND. The second objection to the proceedings is equally without merit, it is urged that the letter of the statute required the application to be presented to the clerk of the circuit court of the county, and that the clerk shall issue the writ, etc., and because in two of the cases, the writs, etc., being issued by the deputy clerks, were void and vitiated the whole proceeding.

Section 1006, Code of 1906, provides for the appointment of deputy clerks in the Supreme, chancery, and circuit courts, "who shall take the oath of office, and who shall, thereupon, have the power to do and perform all of the acts and duties which their principals may do and perform."

We take it for granted that counsel will not contend that the deputy clerks who signed the papers were not in fact deputy clerks, or that it was necessary for the Telegraph Company to show that they were. Their right to act as deputy clerks is not questioned, and we think on this point a mere citation of the section of the Code last above referred to is a complete answer to this objection.

None of the authorities cited by counsel on this point sustain his proposition. The powers conferred upon deputy clerks by the Mississippi statute are broad and comprehensive. The deputy clerks have power by virtue of the statute to do and perform all of the acts and duties performed by their principals. The rights of deputy clerks in Mississippi to perform the functions which they did perform in these cases has never been questioned. They stand in the place of their principals in all matters in which the principal can act. The duties are not devolved upon the deputies by the principal, but they are devolved upon the deputies by the language of

the statute and this is a test which underlies all of the cases cited by counsel. The case of Sullivan vs. Railroad Co., 85 Miss., cited by counsel on page 8 of the brief, does not touch the question here involved.

THIRD. The third point is that the Telegraph Company did not have the power or authority to condemn the railroad right of way because it was property already devoted to the public use.

We submit that the right of the Telegraph Company to condemn the rights of way of railroad companies in the State of Mississippi is conclusively settled in the case of Cumberland Tel. & Tel. Co. vs. Y. and M. V. R. R. Co., 90 Miss., 686, in which case this question was most elaborately considered. It was urged in that case that the Telephone Company which was the party there seeking to condemn did not have the right or power to condemn the right of way of the Railroad Company longitudinally, but could only condemn a right of way across the railroad. The court in an elaborate opinion held that section 925 in connection with section 929 of the Code of 1906 gave power to foreign *telegraph* and telephone companies to condemn rights of ways of railroad companies in Mississippi, and this settled that question so far as this case is concerned, and we deem it unnecessary to discuss this feature of the case further. We have no reason to suppose that the decision in that case will be overruled and, unless overruled, it is the law of this case so far as this point is concerned.

FOURTH. It is claimed that the judgments are void and should be canceled as a cloud upon complainant's title because the statutes of this State only authorize telegraph companies to exercise the power of eminent domain for the purpose of constructing *new lines*, and that in fact it is not the purpose of the Telegraph Company to construct new lines as alleged in its applications and authorized by the judgments, but to attempt to maintain existing lines.

By what process of reasoning the complainant arrives at the conclusion that the proceedings are void because the Telegraph Company might undertake to do something which was not authorized by them, we must confess we are unable to understand. The validity of the proceedings is one thing, what the Telegraph Company might undertake to do under them is quite another thing. The court will see that the pro-

ceedings are incorporated in the bill and the applications are filed as exhibits to the bill and made parts thereof. For the applications see pages 32 to 58 of the transcript. The court will see that these applications contain stipulations as to what the Telegraph Company proposed to do, the character of the line to be constructed, and the manner in which it is to be constructed all of which is set forth in detail in each of the applications. The court will, also, see that in each of the applications this language is used, "The said line of poles, crossarms, and wires to be constructed and for which this condemnation is sought, *being a new line*." With each of these applications a blue print was filed showing and delineating the route and made a part of the application. The applications in these cases were very carefully drawn so as to conform with the law as set forth in the statates, and to meet all of the requirements of the statutes, and also in the light of many adjudicated cases. It will be seen that the judgments all provide that the said lines shall be constructed in the manner and with all the safeguards set forth in the petition.

In the case of M. & O. R. R. Co. vs. Postal Tel. Co., 76 Miss., 731, the Mississippi court held at pages 752 and 753, that these stipulations contained in the application were valid and enforceable.

By the chapter on Eminent Domain, section 1872, of the Code of 1906, the whole record is required to be filed in the office of the clerk of the circuit court and remain there as a record thereof, and as such subject to be filed by any person interested and recorded in the records of the deeds of the county. In other words, the application together with all of the proceedings, down to and including the judgment, constitutes the title of the party condemning, and is the charter of its rights, defining and limiting them, and it is to this the court must look in determining whether the proceedings are valid or invalid, and not to any mere allegation in the bill as to what might be done by the Telegraph Company. In other words, in determining the question here as to whether or not the proceedings are void, the court must look to the proceedings themselves which were made parts of the bill, and these proceedings as set forth must control. This is a universal rule of law (See 16 Cyc., 236, 237; Ency. Pl. & Pr., Vol. 8, p. 741, note 1; Frieberg vs. Magold, 70 Tex., 116; 1st Beach on

Equity Proceeding & Practice, 229; 31 Miss., 63; 64 Ill., App., 239; 30 Ill., App., 17; 97 Md., 725; 40 W. Va., 553; 122 Fed., 363).

It must be carefully borne in mind that the bill is an attack on the proceedings themselves, as being void for the reasons set forth in the bill, as clouds upon plaintiff's title, and this court will certainly not declare the proceedings void upon the ground that the Telegraph Company might undertake to do something which would be violative of the stipulations in the petitions, and violative of the rights conferred by the judgments and unauthorized by them, and unauthorized by the law.

It is true, that one witness did testify in one of the cases, that the Telegraph Company did want to maintain the old line, but certainly under the proceedings, as set forth in this record, no such right was conferred. The complainant might as well say that the proceedings were void because the Telegraph Company did not intend to construct its lines in accordance with any other stipulation in the application, or to violate the law in any other respect; that the proceedings must be held to be void because the Telegraph Company intends to erect its poles in such manner as to endanger the property of the Railroad Company, or to interfere with the running of its trains, or that it did not intend to remove its poles if at any time it became necessary for the Railroad to occupy the space occupied by the Telegraph Company as stipulated in the applications. These are matters which are altogether outside of the question as to the validity of the proceedings themselves, and should the Telegraph Company undertake to violate the stipulations, the Railroad Company would have its complete and adequate remedy.

What the Telegraph Company might want to do under the proceeding and what it is authorized by law to do, are entirely different things and depend upon different considerations.

The court must look to the applications and to the judgments which were rendered to determine their validity and can not consider the conjectures of the complainant as to what might be done by the Telegraph Company in violation of the right conferred.

In considering the matter of anticipating, or taking into consideration by way of anticipation, in the condemnation

proceedings the suggestion that the Telegraph Company might act in violation of law, or the rights conferred by the proceedings or in violation of the stipulations upon which the condemnation proceedings are had, we direct the court's attention to the following cases, which will be found instructive:

Mobile & Ohio R. R. Co. vs. Postal Tel. Co., 76 Miss., 739.

Postal Tel. Co. vs. Oregon Railroad Co., 23 Utah, 474.

Mobile & Ohio R. R. Co. vs. Postal Tel. Co., 120 Ala., 474.

Mobile & Ohio R. R. Co. vs. Postal Tel. Co., 101 Tenn., 62.

Atlantic Railroad Co. vs. Postal Tel. Co., 120 Ga., 269-280.

St. Louis R. R. Co. vs. Postal Tel. Co., 173 Ill., 508.

Postal Tel. Co. vs. Louisiana Western R. R. Co., 49 La. Ann., 1270.

Chicago R. R. Co. vs. Chicago, 166 U. S., 226.

Georgia R. R. Co. vs. Postal Tel. Co., 152 Fed., 991.

The general rule is laid down in 15 Cyc., 728, as follows:

"In proceedings to condemn land, or to obtain compensation for land already taken or injured, damages are assessed upon the theory of a lawful taking and a proper construction and operation of the improvement in question. No damages are included except as will necessarily arise in the proper construction and operation of the work. Anticipated or past negligence in the construction of the improvement is not, therefore, an element of damage, and the same is true where the completed improvement is maintained and operated in a negligent manner, or so as to constitute a nuisance. So in such a proceeding there can be no recovery for an original wrongful entry, nor for trespasses committed in constructing the improvement. The remedy of the land owner in such cases is a common-law action for damages. The rules stated in this section are strictly applicable, although the Constitution provides that compensation shall be made for injuring or destroying property as well as for taking it, and they also apply under statutes providing not only that just compensation for the land shall be made, but likewise for incidental loss or damage

such as must necessarily or reasonably result from the appropriation of the land and construction of the road." See, also, Davis vs. Y. & M. V. R. R. Co., 73 Miss., 678.

The purpose of citing these cases and the rule from Cyc. is to make it clear that in condemnation cases the presumption is that those things alone will be done which are lawful to be done and permissible under the applications and judgments rendered and the proceedings cannot be delayed or thwarted by conjectures or suggestions that the condemning party will act in an illegal manner, will not act in accordance with the terms of the judgment or the stipulations contained in the applications.

Redress for all of these matters is ample should the occasion arise.

The rules which we have set forth are of universal application, and if these matters cannot be considered in a condemnation proceeding, certainly the court would not hold the judgment void because the land owner suggested that the plaintiff in the condemnation proceeding would not abide by its terms.

It is settled in Mississippi that equity will not relieve if the "injury complained of is doubtful, eventful or contingent." Freen vs. Lake, 54 Miss., at page 546. "It is not enough to show probable or contingent injury, but it must be shown to be inevitable and undoubted." CAMPBELL, J., in McCutchen vs. Blanton, 59 Miss., 122.

It is urged that the judgments are void because by reasons of the provision of the chapter on Eminent Domain, as construed by the Mississippi court, the Railroad Company is deprived of its property without due process of law, and denied the equal protection of the law for the reasons:

FIRST. Because in the eminent domain proceedings the Railroad Company was not afforded an opportunity to be heard as to whether the use for which the property was proposed to be taken is a public use.

SECOND. As to whether the purpose for which the said property is purported to have been condemned is for the erection of a new line, or only for the maintenance of an existing line.

THIRD. As to whether said line is constructed so as not to be dangerous to persons or property, and so as not to interfere with the convenience of the complainant.

That for these reasons chapter 43, Code, 1906, is in violation of the Fourteenth Amendment of the Constitution of the United States, and that said judgments should be canceled and annulled, and decreed to be of no force and effect.

In regard to the first reason assigned, it is sufficient to say that no issue is raised in the bill, no denial is made, and none could be successfully made or fairly made, that the use for which the right of way is condemned was for a public use. In the case of Vinegar Bend Lumber Co. vs. Oak Grove Railroad Co., *supra*, the Mississippi court has passed upon this subject, for in that case the very question mooted was that the proposed condemnation proceeding was not for a public use, and this court held that while it is true that question being a judicial question could not be determined by a court of eminent domain, or in the circuit court on appeal, still it could be considered and determined through the chancery court, and that all constitutional rights of the property owner were fully protected in this respect. The bill does not charge that the condemnation was for a private and not a public use, but merely complains that that question could not be raised in the eminent domain court.

What has been said in answer to the *first* ground of objection, applied equally to the *second*. That is to say, conceding that the question as to whether condemnation proceedings were in fact for the maintenance of the old line, and not for the construction of a new line, could not be considered in the eminent domain court, no constitutional right of the complainant was violated or infringed, and should the Telegraph Company undertake to do what it has no right to do under the condemnation proceedings, and under the laws of the state, it is perfectly manifest that the Railroad Company has its full, complete and adequate remedy, either by proper bill in equity, or by an action at law for damages. The Telegraph Company would be a trespasser, and its poles and wires could be removed from the right of way either under judicial process, or by the act of the Railroad Company itself, as was done in the Pennsylvania case, *supra*. In that case, it being judicially determined that the Telegraph Com-

pany had no right to maintain its poles and wires upon the right of way, they were cut down by the railroad company and removed.

It has heretofore been shown that the possibility that the Telegraph Company might violate the law and the terms under which it acquires the right to condemn, are contingent, remote and eventual, and not proper matters for consideration in condemnation proceedings.

THIRD. As to the third ground, it is amply settled by both the decisions of the Mississippi Court in the case of M. & O. R. R. Co. vs. Postal Tel. Co., 76 Miss., 731, and the quotation from 15 Cyc. *supra*, and the other authorities cited, that the claim that the Telegraph Company might erect its lines so as to violate the terms of its stipulations, or the statute under which it proceeds, by improper construction of its lines, are matters not to be considered in a condemnation proceeding, but should these conditions arise, the Railroad Company has its complete and adequate remedy by an action for damages. In other words, there is nothing in the contention that any constitutional right of the complainant is infringed by the proceedings, themselves, or by the statute which authorizes them. The proceeding in the eminent domain court it is true is a summary proceeding, but it is a proceeding for the determination of one matter only, and that is the amount of compensation, and no complaint is made on that score. All substantial rights of the complainant are fully preserved to it, and can be asserted in proper proceedings, full and equal protection of the law is afforded complainant.

We respectfully submit that there is absolutely no merit in any of the contentions set up in the bill, and that the decree of the court below dismissing the bill should be affirmed.

Respectfully submitted,

RUSH TAGGART,

J. B. HARRIS,

GEORGE H. FEARONS,

for Western Union Telegraph Company.

LOUISVILLE & NASHVILLE RAILROAD CO. *v.* WESTERN UNION TELEGRAPH CO.

APPEAL FROM THE DISTRICT COUCT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

No. 337. Argued March 20, 1914.—Decided June 8, 1914.

On a direct appeal under § 238, Judicial Code, from a judgment of the District Court dismissing the bill for want of jurisdiction on the ground that neither of the parties was a resident of that district and that the suit was one that could only be brought in a district in which

one of the parties resided, this court is only concerned with the jurisdiction of the District Court as a Federal court; whether appellant is entitled to the relief sought is not a jurisdictional question in the sense of § 238.

When the matter in controversy is of the requisite value and diverse citizenship exists, the question is simply whether the case is cognizable in the particular District Court in which the case is brought.

Section 57, Judicial Code, makes suits to remove any encumbrance, lien or cloud upon title to real or personal property cognizable by the District Court of the district in which the property is situated regardless of residence of the parties and process for service of the non-resident defendants by notification outside of the district or by publication.

The provision in § 57, Judicial Code, respecting suits to remove clouds from title embraces a suit to remove a cloud cast upon the title by a deed or instrument which is void upon its face when such suit is founded upon a remedial statute of the State, as well as when resting upon established usages and practice of equity.

As construed by the highest court of Mississippi, § 975, Rev. Code of 1871 of that State entitles the rightful owner of real property in that State to maintain a suit to dispel a cloud cast upon the title thereto by an invalid deed, even though, under applicable principles of equity, it be void on its face.

In Mississippi, as declared by its highest court, the judgment of a special court of eminent domain may be challenged by a bill in equity upon the ground that the condemnation is not for a public purpose, and if other elements of Federal jurisdiction are present the case is one to remove cloud upon title and, under § 57, Judicial Code, the case is cognizable in the District Court of the district in which the property is situated although neither of the parties reside therein.

THE facts, which involve the jurisdiction of the District Courts of the United States under § 57, Judicial Code, are stated in the opinion.

Mr. Gregory L. Smith, with whom *Mr. Henry L. Stone* was on the brief, for appellant.

Mr. Rush Taggart, with whom *Mr. J. B. Harris* and *Mr. George H. Fearons* were on the brief, for appellee.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

By a bill in equity exhibited in the District Court the appellant seeks the annulment of three judgments of special courts of eminent domain in Harrison, Jackson and Hancock Counties, Mississippi, purporting to condemn portions of its right of way in those counties for the use of the appellee. According to the allegations of the bill, when given the effect that must be given to them for present purposes, the case is this: The appellant has a fee simple title to the land constituting the right of way and is in possession, and the appellee is asserting a right to subject portions of the right of way to its use under the three judgments, recently obtained. The appellant insists, for various reasons fully set forth, that the judgments were procured and rendered in such disregard of applicable local laws as to be clearly invalid, and that they operate to becloud its title. The matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, the right of way is within the district in which the bill was filed, and the appellant and appellee are, respectively, Kentucky and New York corporations. The prayer of the bill is, that the judgments be held null and void and the appellee enjoined from exercising or asserting any right under them. Appearing specially for the purpose, the appellee objected to the District Court's jurisdiction, upon the ground that neither of the parties was a resident of that district and that the suit was not one that could be brought in a district other than that of the residence of one of them without the appellee's consent. The court sustained the objection, dismissed the bill, and allowed this direct appeal under § 238 of the Judicial Code.

We are only concerned with the jurisdiction of the District Court as a Federal court, that is, with its power to entertain the suit under the laws of the United States.

Fore River Shipbuilding Co. v. *Hagg*, 219 U. S. 175; *United States* v. *Congress Construction Co.*, 222 U. S. 199; *Chase* v. *Wetzlar*, 225 U. S. 79, 83. Whether upon the showing in the bill the appellant is entitled to the relief sought is not a jurisdictional question in the sense of § 238 and is not before us. *Smith* v. *McKay*, 161 U. S. 355; *Citizens' Savings & Trust Co.* v. *Illinois Central Railroad Co.*, 205 U. S. 46, 58; *Darnell* v. *Illinois Central Railroad Co.*, 225 U. S. 243.

As the matter in controversy is of the requisite value and the parties are citizens of different States, the suit manifestly is within the general class over which the District Courts are given jurisdiction by the Judicial Code, § 24, cl. 1; so the question for decision is, whether the suit is cognizable in the particular District Court in which it was brought.

In distributing the jurisdiction conferred in general terms upon the District Courts, the code declares, in § 51, that, "except as provided in the six succeeding sections, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." If this section be applicable to suits which are local in their nature, as well as to such as are transitory (as to which see *Casey* v. *Adams*, 102 U. S. 66; *Greeley* v. *Lowe*, 155 U. S. 58; *Ellenwood* v. *Marietta Chair Co.*, 158 U. S. 105; *Kentucky Coal Lands Co.* v. *Mineral Development Co.*, 191 Fed. Rep. 899, 915), it is clear that the District Court in which the suit was brought cannot entertain it, unless one of the six succeeding sections provides otherwise, or the appellee waives its personal privilege of being sued only in the district of its or the appellant's residence. *In re Moore*, 209 U. S. 490;

Western Loan Co. v. *Butte & Boston Mining Co.*, 210 U. S. 368.

The appellant relies upon § 57, one of the six succeeding sections, as adequately sustaining the jurisdiction. This section reads as follows:

"When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal prop-

erty against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

It will be perceived that this section not only plainly contemplates that a suit "to remove any incumbrance, lien or cloud upon the title to real or personal property" shall be cognizable in the District Court of the district wherein the property is located, but expressly provides for notifying the defendant by personal service outside the district, and, if that be impracticable, by publication. The section has been several times considered by this court, and, unless there be merit in an objection yet to be noticed, the decisions leave no doubt of its applicability to the present suit, even though both parties reside outside the district. *Greeley* v. *Lowe*, 155 U. S. 58; *Dick* v. *Foraker*, *Id.* 404; *Jellenik* v. *Huron Copper Co.*, 177 U. S. 1; *Citizens' Savings & Trust Co.* v. *Illinois Central Railroad Co.*, 205 U. S. 46; *Chase* v. *Wetzlar*, 225 U. S. 79.

The appellee, after asserting that each of the judgments is void upon its face if the attack upon it in the bill is well taken, calls attention to the general rule that a bill in equity does not lie to cancel, as a cloud upon title, a conveyance or instrument that is void upon its face, and then insists that § 57 must be regarded as adopted in the light of that rule and as not intended to displace it or to embrace a suit brought in opposition to it. The difficulty

with this contention is that it seeks to make the usages of courts of equity the sole test of what constitutes a cloud upon title, so as to bring a suit to remove it within the operation of § 57, and disregards the bearing which the state law rightly has upon the question. As long ago as 1839 this court had occasion, in *Clark* v. *Smith*, 13 Pet. 195, to consider whether a Federal court sitting in the State of Kentucky could entertain a suit to remove a cloud from the title to real property in that State where the right to such relief depended upon a remedial statute of the State; and in the opinion, which fully sustained the jurisdiction, the court pointed out that the nature of the right was such that it could only be enforced in a court of equity, and then said (p. 203): "Kentucky has the undoubted power to regulate and protect individual rights to her soil, and to declare what shall form a cloud on titles; and having so declared, the courts of the United States, by removing such clouds, are only applying an old practice to a new equity created by the legislature. . . . The state legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the Chancery side of the Federal courts, no reason exists why it should not be pursued in the same form as it is in the state courts; on the contrary, propriety and convenience suggest, that the practice should not materially differ, where titles to lands are the subjects of investigation. And such is the constant course of the Federal courts." The principle of that decision has been reaffirmed and applied in many cases, one being *Reynolds* v. *Crawfordsville Bank*, 112 U. S. 405. It was a suit in the Circuit Court for the District of Indiana to remove a cloud from title in virtue of a statute of that State, and the objection was interposed that the deed sought to be

canceled was void upon its face and therefore afforded no basis for such a suit in a Federal court. But this court pronounced the objection untenable, saying (p. 410): "While, therefore, the courts of equity may have generally adopted the rule that a deed, void upon its face, does not cast a cloud upon the title which a court of equity would undertake to remove, we may yet look to the legislation of the State in which the court sits to ascertain what constitutes a cloud upon the title, and what the state laws declare to be such the courts of the United States sitting in equity have jurisdiction to remove." Citing *Clark* v. *Smith, supra.* See also *Cowley* v. *Northern Pacific Railroad Co.*, 159 U. S. 569, 582. There are many state statutes of this type, and our decisions show that their enforcement in the Federal courts is subject to but three restrictions: 1. The case must be within the general class over which those courts are given jurisdiction. 2. A suit in equity does not lie in those courts where there is a plain, adequate and complete remedy at law. 3. In those courts there can be no commingling of legal and equitable remedies, or substitution of the latter for the former, whereby the constitutional right of trial by jury in actions at law is defeated. Judicial Code, §§ 24 (cl. 1) and 267; *Whitehead* v. *Shattuck*, 138 U. S. 146, 152, 156; *Greeley* v. *Lowe*, 155 U. S. 58, 75; *Wehrman* v. *Conklin, Id.* 314, 323; *Lawson* v. *United States Mining Co.*, 207 U. S. 1, 9.

We conclude that the provision in § 57 of the Judicial Code, respecting suits to remove clouds from title, was intended to embrace, and does embrace, suits of that nature when founded upon the remedial statutes of the several States, as well as when resting upon established usages and practice in equity.

The State of Mississippi has such a statute. Code of 1906, § 550. Although originally more restricted (Hutchinson's Code, p. 773; Rev. Code 1857, p. 541, art. 8), it has read as follows since 1871 (Rev. Code 1871, § 975):

"When a person, not the rightful owner of any real estate, shall have any conveyance or other evidence of title thereto, or shall assert any claim, or pretend to have any right or title thereto, which may cast doubt or suspicion on the title of the real owner, such real owner may file a bill in the chancery court to have such conveyance or other evidence or claim of title canceled, and such cloud, doubt or suspicion removed from said title, whether such real owner be in possession or not, or be threatened to be disturbed in his possession or not, and whether the defendant be a resident of this state or not."

While we have not been referred to any decision of the Supreme Court of the State passing directly upon the question, whether a conveyance or other evidence of title void upon its face is within the purview of this statute, the decisions of that court brought to our attention show that it has treated the statute as embracing conveyances described as "void"—whether the invalidity was shown upon the face of the instrument being left uncertain—*Ezelle* v. *Parker*, 41 Mississippi, 520; *Wofford* v. *Bailey*, 57 Mississippi, 239; *Drysdale* v. *Biloxi Canning Co.*, 67 Mississippi, 534; *Preston* v. *Banks*, 71 Mississippi, 601; *Wildberger* v. *Puckett*, 78 Mississippi, 650; and also that it regards the statute as very comprehensive and materially enlarging existing equitable remedies. In *Huntington* v. *Allen*, 44 Mississippi, 654, 662, it was said: "The statute in reference to the removal of clouds from title, enlarges the principle upon which courts of equity were accustomed to administer relief. It is very broad, allowing the real owner in all cases, to apply for the cancellation of a deed or other evidence of title, which casts a cloud or suspicion on his title. . . . The terms used in the statute, expressive of the scope of the jurisdiction, viz., 'cloud,' 'doubt,' 'suspicion,' quite distinctly imply that the instrument which creates them is apparent rather than 'real;' is 'semblance' rather than substance; obscures rather than

destroys or defeats." In *Cook* v. *Friley*, 61 Mississippi, 1, 4, it was further said: "The statute . . . not only authorizes the real owner to file his bill to cancel a paper title, but also to remove the cloud, doubt or suspicion which may spring from the assertion of claim or pretense of right or title thereto by the defendant, who without any muniment of title may assert a claim or pretend to have right or title. The purpose was to give the real owner a remedy against one who asserts any claim or pretends to have any right or title to such owner's land, in analogy to the right of action by the canon law for jactitation of marriage. The real owner is entitled to protection against jactitation of title to the disparagement of his real ownership. He may bring into court one who asserts any claim or pretends to have any right or title to his land, and require him to vindicate his claim or submit to its extinguishment by decree of the court." And in *Peoples Bank* v. *West*, 67 Mississippi, 729, 740, the court concluded its opinion with the statement: "We know of no line by which the jurisdiction of the court is limited other than that prescribed by the law which confers it. When the complainant shows a perfect title, legal or equitable, and the title of the defendant is shown to be invalid, it is, in the nature of things, a cloud upon the title of complainant, and should be canceled."

In view of these decisions, we think the statute must be regarded as entitling the rightful owner of real property in the State to maintain a suit to dispel a cloud cast upon his title by an invalid deed or other instrument, even though it be one which, when tested by applicable legal principles, is void upon its face.

The judgments sought to be canceled as clouds upon the appellant's title were rendered by special courts of eminent domain, each composed of a justice of the peace and a jury. According to the statute controlling such proceedings (Miss. Code, 1906, c. 43) the special court is not

permitted to quash or dismiss the proceeding for want of jurisdiction or for any other reason, or to inquire whether the applicant has a right to condemn or whether the contemplated use is public, but "must proceed with the condemnation" (§§ 1862, 1865, 1866); and, while an appeal lies to the Circuit Court, a supersedeas is not permitted, and upon the appeal the Circuit Court is restricted, like the special court, to an ascertainment of the compensation to be paid to the owner (§ 1871). A form of judgment is prescribed, which contains blanks for a description of the property and a recital of the compensation awarded, and then declares: "Now, upon payment of the said award, applicant can enter upon and take possession of the said property and appropriate it to public use as prayed for in the application" (§ 1867). An affirmative provision to the same effect also appears in the statute (§ 1868). Considering these statutory provisions and § 17 of the state constitution which declares that the question whether the condemnation is for a public use shall be a judicial question, the Supreme Court of the State holds that "the only question which can be raised in the eminent domain court, and the only jurisdiction confided to it, is the jurisdiction to ascertain the amount of damage sustained by the party whose lands are sought to be taken;" that "a new issue, involving a new question and new pleadings, cannot be raised in the appellate tribunal, that is to say, in the circuit court;" that the owner "may litigate the right to take his property at any time before acceptance of the compensation, or before the waiver of his right to have the question of the use judicially determined;" that "neither the constitution nor the laws of the State provide any particular tribunal in which this question shall be determined, nor is it a matter of any particular concern in what court the question shall be settled, provided it be determined in that forum which is capable of deciding it," and that the

appropriate mode of litigating the question is by a suit in equity challenging the right of the condemnor to enter under the judgment of the court of eminent domain. *Vinegar Bend Lumber Co.* v. *Oak Grove & Georgetown Railroad Co.*, 89 Mississippi, 84, 107, 108, 110, 112. Thus it will be perceived that under the law of the State, as declared by its court of last resort, the judgment of a special court of eminent domain may be challenged by a bill in equity upon the ground that the condemnation is not for a public purpose. This being so, and the elements of Federal jurisdiction being present, the litigation may, of course, be had in a Federal court. One of the grounds upon which the judgments are challenged in the present bill is that the condemnation is not for a public purpose. If this ground be well taken, as to which we intimate no opinion, the judgments apparently confer upon the appellee a right in the appellant's right of way to which the appellee is not entitled.

We conclude that the suit is one to remove a cloud from title within the meaning of § 57 of the Judicial Code, and is cognizable in the court below, although neither of the parties resides in that district.

Decree reversed.